Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

NATIVE WHOLESALE SUPPLY, A CORPORATION CHARTERED BY THE SAC AND FOX TRIBE OF OKLAHOMA,
Petitioner,

v.

STATE OF OKLAHOMA EX REL. W.A. "DREW" EDMONDSON, ATTORNEY GENERAL OF OKLAHOMA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a contract entered into by an Indian Tribe and fully performed outside the exterior boundaries of the state in which the Tribe's reservation is located can constitutionally subject the out of state vendor to the personal jurisdiction of the state in which the Tribe's reservation is located.

2. Whether a state can prohibit an Indian Tribe located within its boundaries from purchasing goods from Indians on a reservation outside the state.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

RULE 29.6 STATEMENT

Petitioner Native Wholesale Supply has no parent company, and no public company owns ten percent or more of the company's stock.

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PETITION FOR A WRIT OF CERTIORARI

Native Wholesale Supply respectfully petitions for a writ of certiorari to review the opinion and judgment of the Oklahoma Supreme Court in this case.

OPINIONS BELOW

The decision of the Oklahoma Supreme Court is reported at 2010 OK 58, 237 P.3d 199, and is reprinted in the Appendix (App. A, 1a-40a). The order of the District Court is not reported, and is reprinted in the Appendix (App. A, 41a-43a).

JURISDICTION

The Oklahoma Supreme Court entered its decision on July 6, 2010. On September 27, 2010, Justice Sotomayor granted an extension of time, until December 3, 2010, in which to file this petition. App. A, 71a. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.3 because it is being filed by the required deadline as extended by a Justice of the Supreme Court for a period not exceeding sixty days pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.5. This Court has jurisdiction to review the judgment of the Oklahoma Supreme Court pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 3

"The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

U.S. Const. amend. XIV, § 1

"No state shall . . . deprive any person of life, liberty, or property, without due process of law; . . . ."

Oklahoma Stat. tit. 12 § 2004 (F) (2009)

"A court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States."

STATEMENT OF THE CASE

I. BACKGROUND FACTS AND ISSUES.

A. Native Wholesale Supply.

Native Wholesale Supply is an Indian corporation that sells Native American manufactured products at wholesale to Indian Tribes and retailers owned by Native Americans and located on tribal land. 237 P.3d at 207-08, App., 13a-18a; 216-17, App., 36a-40a. Native Wholesale is a distributor, and does not manufacture the products it sells. 237 P.3d at 207. App. 13a Tobacco products sold by Native Wholesale are sold on an F.O.B (Freight On Board) Seneca Nation basis, with title and risk of loss transferring to

the buyer at the point of sale. Montour affidavit (Montour aff.) at ¶ 6, App., 67a; Okla. Stat. tit. 12A § 2-401(2)(a). Shipments occur at Foreign Trade Zones, one of which is located in Las Vegas, Nevada. 237 P.3d at 207, App., 13a, 216, App., 18a. No sales or shipments are made in Oklahoma. Montour aff. at ¶ 6, App., 67a. All sales are made from Native Wholesale's corporate headquarters located on the Seneca Cattaraugus Indian Territory, within the exterior boundaries of the State of New York. 237 P.3d at 215, App., 36a. Montour aff. at ¶¶ 5, 6, App., 67a. Native Wholesale has no other office. Montour aff. at ¶ 12, App., 66a.

Native Wholesale is a corporation chartered by the Sac and Fox Nation. 237 P.3d at 209, App., 20a. Its president and sole shareholder is a Native American enrolled in the Seneca Nation. 237 P.3d at 209, App., 20a, 211, App., 23a. Both the Sac and Fox Nation and the Seneca Nation are federally recognized Indian tribes. 75 Fed. Reg. 60812.

B. The Muscogee Creek Tribe.

The Muscogee Creek Tribe is a federally recognized Indian Tribe. 75 Fed. Reg. 60811. Its reservation is within the exterior boundaries of the State of Oklahoma. 237 P.3d at 208, App., 15a. Muscogee Creek Nation Wholesale is a tribal entity owned and operated by the Muscogee Creek Tribe. 237 P.3d at 216, App., 37a. ("The transactions at issue in this case are between a Sac and Fox chartered corporation operating on the tribal land of another tribe with a third tribe, the Muscogee Creek Nation"); *see also id.* at 208 n.38, App., 16a. Muscogee Creek Wholesale

went outside of Oklahoma to purchase cigarettes from Native Wholesale. 237 P.3d at 208; App., 16a.

C. Cigarette Regulation.

The United States government has a comprehensive statutory and regulatory scheme governing the manufacture and sale of cigarettes. *E.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001) ("In the [FCLAA's] pre-emption provision, Congress . . . precludes States or localities from imposing any requirements or prohibition based on smoking and health with respect to the advertising and promotion of cigarettes")[1]; *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008) (states are without authority to require cigarette retail businesses to use delivery companies that provide recipient age verification); Prevent All Cigarette Trafficking Act of 2009, 15 U.S.C. §§ 375 *et seq.*; Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 *et seq.*

The permissible scope of state regulation of cigarettes is limited. *See Lorillard, supra; Rowe, supra.*

D. Oklahoma's Contract with the Major Tobacco Companies.

Cigarettes are legal in Oklahoma. *E.g.*, Okla. Stat. tit. 68 § 360.1 *et seq.* Indeed, Oklahoma has entered into a contract with major tobacco companies called the Master Settlement Agreement or MSA. 237 P.3d

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[1] Federal Cigarette Labeling and Advertising Act, 79 Stat. 282, as amended; 15 U.S.C. §§ 1331 *et seq.*

at 203, App., 3a. The MSA allows companies who contract with Oklahoma to sell their cigarette brands in the State, but only if they pay Oklahoma a share of the profits from those cigarette sales. *Id.* These are profits paid pursuant to a contract; they are not a tax. 237 P.3d at 216, App., 38a. ("Neither the underlying MSA–imposed escrow obligation of the tobacco manufacturer nor the equitable relief sought against Native Wholesale Supply is a tax"). In return for its share of the profits, Oklahoma has agreed "diligently" to protect the market share of its cigarette company partners. MSA, § IX(d)(2)(B).[2] To do so, if a company does not contract with Oklahoma, the State prohibits the sale of the company's cigarette brands in Oklahoma. Okla. Stat. tit. 37, §§ 600.21-600.23; Okla. Stat. tit. 68, §§ 360.1 *et seq*. Under its contract, Oklahoma does not regulate cigarettes; instead it only regulates product brands – outlawing those brands produced by any company with which it does not have a contract. 237 P.3d at 216, App., 38a. (these laws are "a method adopted by the State to regulate the distribution and sale of Tobacco products in the Oklahoma market").

To further protect its cigarette partners, Oklahoma has passed a law applying only to them and that allows its partners to appeal judgments under special rules that limit required appeal bond amounts. Okla. Stat. tit. 12 § 990.4(B)(5).[3] There can be no doubt that

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[2] Available at http://www.naag.org/backpages/naag/tobacco/mas/mas-pdf/MSA%20with%20Sig%20Pages%20and%20Exhibits.pdf/file_view (last visited December 1, 2010).

[3] Oklahoma also statutorily mandates protective cigarette prices, as confirmed by the United States Centers for Disease Control

these limits are to protect the State's cigarette profits, as the statute itself confirms that fact:

> In order to protect any monies payable to the Tobacco Settlement Fund as set forth in Section 50 of Title 62 of the Oklahoma Statutes, the bond in any action or litigation brought under any legal theory involving a signatory, successor of a signatory or an affiliate of a signatory to the Master Settlement Agreement . . . shall [be limited].

Id.

II. THE CURRENT LITIGATION.

A. The District Court Proceedings.

On May 29, 2008, the Oklahoma Attorney General filed a civil petition against Native Wholesale in the Oklahoma County District Court. App., 44a-48a. The State filed its petition pursuant to Oklahoma's laws that protect the market share of its contract partner cigarette companies, complaining only that Native Wholesale sold to the Muscogee Creek Nation cigarette brands that "have not been listed on the Oklahoma Attorney General's Directory and its products have not been approved for sale within the State of Oklahoma."

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and Prevention. Morbidity and Mortality Weekly Report (MMWR), v. 59 no. 13, April 9, 2010, State Cigarette Minimum Price Laws – United States, 2009, at 389, 391, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5913a2.htm (last visited December 1, 2010).

App., 47a; Pet. ¶¶ 9-10 at 3: "Violation by Defendant."[4] *See* 237 P.3d at 204, App., 3a-7a.

The petition did not allege that Native Wholesale had failed to perform any duties as a manufacturer of cigarettes. Instead, it only challenged Native Wholesale's distribution (wholesale) activities. Oklahoma's petition sought disgorgement of gross proceeds from wholesale cigarette sales that occurred outside the State of Oklahoma, and injunctive relief preventing Native Wholesale from selling cigarettes to the Muscogee Creek Nation outside Oklahoma. District Court Order at 1, App. A, 41a.

Oklahoma's petition raised one straightforward issue: state enforcement of the "method adopted by the State [of Oklahoma] to regulate the distribution and sale of tobacco products in the Oklahoma market." 237 P.3d at 216, App., 38a. The petition did not raise tax issues.[5] Nor did it raise health issues: there are no allegations in the record or otherwise of any health or material product differences between the cigarettes manufactured by Oklahoma's contract partners and the cigarettes distributed by Native Wholesale. Instead, the Oklahoma Attorney General sought only to stop a federally recognized Indian Tribe located in the State from going outside the State to purchase from other Indians a product that is legal in Oklahoma.

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[4] Alleging that "Native Wholesale Supply knowingly and unlawfully sold . . . Seneca brand cigarettes manufactured by GRE to Muscogee Creek Nation Wholesale."

[5] 237 P.3d at 216, App., 38a.

On November 5, 2008, Native Wholesale moved to dismiss the State's petition for lack of personal and subject matter jurisdiction. The Attorney General filed an amended petition on November 21, 2008, and a second amended petition on February 24, 2009. The amended petition and second amended petition added factual averments regarding Native Wholesale's operations, but contained no material changes to the specific claimed "Violations by Defendant." Compare Pet. ¶¶ 9-10 at 3 ("Violations by Defendant") (App., 47a) with Second Amended Pet. ¶¶ 30-31 at 11-12 ("Violations by Defendant") (App. A, 54a-55a).[6]

Native Wholesale moved to dismiss the second amended petition on March 11, 2009, again challenging the district court's personal and subject matter jurisdiction.

B. The District Court's Decision.

The district court entered its Journal Entry of Judgment on June 10, 2009, dismissing the petition with prejudice for lack of subject matter jurisdiction. App. A, 41a-43a. In doing so, the district court denied Native Wholesale's motion to dismiss based on lack of personal jurisdiction.

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[6] Oklahoma nowhere claimed, and neither the district court nor the Oklahoma Supreme Court held, that general personal jurisdiction exists over Native Wholesale in Oklahoma, which it does not.

C. The Oklahoma Supreme Court's Decision.

The Attorney General appealed the district court's decision dismissing the case for lack of subject matter jurisdiction on June 19, 2009. On July 28, 2009, Native Wholesale cross appealed on that portion of the district court's order denying its motion to dismiss for lack of personal jurisdiction. On July 6, 2010, the Oklahoma Supreme Court, applying specific personal jurisdiction analysis, affirmed the district court's order regarding personal jurisdiction, holding that Native Wholesale "deliver[s] its products into the stream of commerce that brings it into Oklahoma." 237 P.3d at 208, App., 18a. The court reversed that portion of the district court's order dismissing the case for lack of subject matter jurisdiction, holding: (1) that Native Wholesale "is not clothed with tribal immunity;"[7] and (2) "there is no blanket ban on state regulation of inter-tribal commerce even on a reservation" (without citation to any legal authority in support).[8]

REASONS FOR GRANTING THE PETITION

There are two reasons why this Court should grant a petition for writ of certiorari and review the Oklahoma Supreme Court's decision.

First, the Oklahoma Supreme Court's decision conflicts with relevant decisions of this Court and decisions of a number of the Courts of Appeals which limit the constitutionally permissible scope of a state's

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[7] 237 P.3d at 210, App., 23a.

[8] 237 P.3d at 215-16, App., 36a.

personal jurisdiction. Specifically, the Oklahoma Supreme Court erroneously applied this Court's tort standard for exercise of specific personal jurisdiction (purposeful direction) in a contract case where this Court's standard is purposeful availment; the court's decision improperly extends the state's regulatory jurisdiction beyond the state's geographic boundaries; and the court ignored this Court's precedent confirming that neither out of state business activities nor a third party's in state activity can constitutionally subject a foreign corporation to a state's specific personal jurisdiction in contract based cases.

Second, the Oklahoma Supreme Court has decided an important question of federal law that has not been, but should be, decided by this Court: whether the Indian Commerce Clause protects Indian Tribes from state regulation of purely Indian commerce that occurs outside of the state's geographic boundaries – specifically, whether it allows a state to prohibit certain companies from trading with Indians outside the state.

I. THE OKLAHOMA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH DECISIONS OF THIS COURT AND UNITED STATES COURTS OF APPEALS.

A. The Oklahoma Supreme Court's Application of This Court's Tort Based "Purposeful Direction" Specific Jurisdiction Standard in a Contract Based Case Requiring "Purposeful Availment"

Conflicts With This Court's Precedent and With Decisions of the Courts of Appeals.

Beginning three decades ago, this Court decided a series of personal jurisdiction cases in which the Court clarified the standards lower courts are to apply when addressing personal jurisdiction issues.[9] In those decisions, when considering whether specific personal jurisdiction can constitutionally be exercised over an out of state defendant, the Court distinguished between contract and tort based claims, and identified a distinct test to be applied for each. For decades, the general test applied to personal jurisdiction challenges required a determination of whether an out of state defendant had "purposefully availed" itself of the laws and protections of the forum state. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws"). A quarter century later, this Court adopted a less stringent analysis applicable to tort based actions, only requiring that a foreign defendant purposefully "direct" its efforts towards residents of another state. *Calder*, 465 U.S. at 790.

Yet in this contract based action, the Oklahoma Supreme Court erroneously embraced and applied this Court's tort based standard. The Oklahoma Supreme

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[9] *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980); *Calder v. Jones*, 465 U.S. 783, 790 (1984); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985); *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 107 (1987).

Court cited this Court's decision in *World-Wide Volkswagen* as tacit approval for doing so, claiming this Court "has gradually relaxed the limits placed on state jurisdiction by the Due Process Clause." 237 P.3d at 206, App., 10a-11a.[10] Yet *World Wide Volkswagen* was a tort case in which the Court held specific personal jurisdiction did not exist. The distinction between this Court's tort and contract based tests - ignored by the Oklahoma Supreme Court - is crucial to personal jurisdiction jurisprudence, and has been recognized as such by a number of United States Courts of Appeals. Simply placing a product in the "stream of commerce" may be sufficient in a tort action, but in a contract action specific "minimum contacts" must exist to support specific personal jurisdiction. *Burger King*, 471 U.S. at 474.[11]

The instant Oklahoma Supreme Court decision, by confusing tort based and contract based specific personal jurisdiction standards, conflicts with this Court's decisions in *Hanson v. Denckla*, *Calder*, and

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[10] In *World-Wide Volkswagen* this Court rejected, as not satisfying constitutional due process protections, the argument that one who sells a product in one forum is subject to jurisdiction in another forum, whose only connection with the seller is that a purchaser transported the product into the forum and suffered an injury there.

[11] The Oklahoma Court recognized its confusion over the applicable standard: "The *Asahi* decision has created significant confusion in lower courts over the constitutional standard for minimum contacts under the stream-of-commerce theory." 237 P.3d at 207, App., 13a-14a.

Worldwide Volkswagen.[12] It also conflicts with decisions of the Courts of Appeals that have applied this Court's distinction between "purposeful availment" in contract actions and a less rigorous "purposeful direction" standard in tort actions.

For example, the Ninth Circuit Court of Appeals specifically has recognized and relied upon the separate standards in a number of cases. *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008) ("we have typically analyzed cases that sound primarily in contract – as [the plaintiff's] case does -- under a purposeful availment' standard"); *Holland Am. Line, Inc. v. Wartsila N. Am. Inc.*, 485 F.3d 450, 460 (9th Cir. 2007) (*Calder* test applies only to intentional torts and requires that the defendant individually and wrongfully target the plaintiff); *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (the less rigorous purposeful direction of activities analysis only applies to "suits sounding in tort").

The Eleventh Circuit has made the same distinction. *Licciardello v. Lovelady*, 544 F.3d 1280, 1285-88 (11th Cir. 2008). In *Licciardello*, the court adopted somewhat different language, labeling the *Calder* tort based "purposeful direction" test "the 'effects' test;" and calling the *Hanson v. Denckla*

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[12] *See also Asahi*, 480 U.S. at 107 (tort action applying purposeful direction analysis); *Burger King*, 471 U.S. at 464-68 (in contract based action specific jurisdiction was proper where defendants purposefully availed themselves of the privilege of conducting business in Florida when they sought out Burger King in Florida, trained in Florida, obtained proprietary information in Florida, purchased $165,000 worth of equipment from Burger King in Florida, and negotiated contract disputes in Florida).

contract based "purposeful availment" test the "minimum contacts" test. *Id.* at 1286.

The Tenth Circuit Court of Appeals also has distinguished between the need to demonstrate an out of state defendant "purposefully availed" itself of the forum's laws and protections in a contract case, while recognizing the existence of a less stringent test applicable to personal jurisdiction analysis in a tort action. *Nat'l Bus. Brokers, Ltd. v. Jim Williamson Prods. Inc.*, 16 Fed. Appx. 959 (10th Cir. 2001) (unpublished opinion). In analyzing whether personal jurisdiction existed based on the plaintiff's contract claims, the Tenth Circuit Court of Appeals noted:

> the exercise of jurisdiction depends on the *nature* of those contacts and whether they represent an effort by the defendant to purposefully avail itself of the privilege of conducting activities within the forum state.

Id. at 962 (internal quotations and citation omitted) (emphasis in original). Yet when analyzing whether personal jurisdiction existed based on the plaintiff's tort based claims, the court used a different test, stating:

> absent allegations of tortious activity in Colorado, exercise of personal jurisdiction under Colorado's long-arm statute is permitted only where 'the injury itself . . . occurred in Colorado.' Further, the injury in Colorado 'must be direct, not consequential and remote.' Thus, the fact that a Colorado resident sustains a loss of profits in Colorado as a result of a tort that occurred elsewhere is insufficient to sustain

> long-arm jurisdiction under the Colorado statute.

Id. at 963 (internal quotations and citations omitted).

Regardless of the labels used, the Courts of Appeals have recognized this Court's standards applicable to differing personal jurisdiction claims, and have applied a more stringent analysis to determine whether specific personal jurisdiction exists in contract based cases.

In this case, there are no allegations or facts in the record demonstrating that the product purchased by the Muscogee Creek Tribe from Native Wholesale was defective or misrepresented, nor any claim of fraud, deception or any personal injury that might implicate tort analysis.[13] Indeed, Oklahoma does not dispute that cigarettes are legal and sold by the millions every day in Oklahoma, nor can it dispute that it profits handsomely from those sales.[14]

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[13] The petition contains no tort claims, and there are no claims or averments that Native Wholesale sold cigarettes that were more dangerous than cigarettes sold by Oklahoma's MSA contract partners, as it did not. Instead, the only activities that Oklahoma alleged as "Violations by Defendant" are that Native Wholesale sold Seneca brand cigarettes "to Muscogee Creek Nation Wholesale." Second Amended Petition at 12, ¶ 31; App., 62a.

[14] In the year it filed this petition, Oklahoma's profits (not taxes) from cigarette sales totaled $89 million, an increase in profits of over $26 million from the year before. Campaign for Tobacco Free Kids (Nov. 11, 2008) available at http://tobaccofreekids.org/research/factsheets/pdf/0286.pdf (last visited December 1, 2010). Of note, to address tobacco control issues in that same year, Oklahoma only spent an amount of federal and state funds equal

Instead, the State's claims are based entirely on contracts entered into on an Indian reservation in New York by a federally recognized Indian Tribe and fully performed outside Oklahoma. In holding that Oklahoma has specific personal jurisdiction to regulate these out of state contracts, the Oklahoma Supreme Court decided an important question of federal law in a way that conflicts with relevant decisions of this Court and Courts of Appeals confirming that in contract cases, a defendant must purposefully avail itself of a forum state's protections before it can be required to defend itself in that state.

This Court has not needed to address a significant personal jurisdiction question for nearly a quarter of a century. Instead, the Court's guidance on the separate personal jurisdiction standards applicable in contract and tort based actions has served as both important and pragmatic guidance to the lower courts. The Oklahoma Supreme Court's decision ignoring this Court's articulated standard applicable to contract based claims warrants granting a writ of certiorari in this case.

B. The Oklahoma Supreme Court's Holding Decides an Important Question of Federal Law in a Way That Conflicts with Decisions of This Court and the Courts of

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to 21 percent of its profits from cigarette sales. *Id.* *See also* Oklahoma Council of Public Affairs, Smoke and Mirrors, http://www.ocpathink.org/publications/perspective-archives/july-2000/?module=perspective&id=1109 (last visited December 1, 2010).

Appeals Which Limit State Extra-Territorial Regulation.

This Court specifically addressed the limits of state regulatory jurisdiction in *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), stating:

> A State may, of course, prohibit and declare invalid the making of certain contracts within its borders. Ordinarily, it may prohibit performance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the State and their performance would violate its laws. But, in the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of re-insurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. . . . Texas was, therefore, without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law.

Id. at 407-08. *Accord, Edgar v. Mite Corp.*, 457 U.S. 624, 643 (1982) ("The limits on a State's power to enact substantive legislation are similar to the limits on the

jurisdiction of state courts"); *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 315 n.2 (1970) ("There must be at least some minimal contact between a State and the regulated subject before it can, consistently with the requirements of due process, exercise legislative jurisdiction").[15]

Finding that specific personal jurisdiction exists in the courts of Oklahoma based solely on Native Wholesale's business operations on the Seneca Nation in New York and at a Foreign Trade Zone in Nevada not only offends due process protections but also conflicts with this Court's precedent regarding expansion of regulatory authority beyond state boundaries. As this Court noted in *Healy v. Beer Inst.*, 491 U.S. 324 (1989):

> A statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.

Id. at 336 (citation omitted). In *Healy* the Court confirmed:

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[15] *Accord Dean Foods Co. v. Brancel*, 187 F.3d 609, 614 (7th Cir. 1999) ("extraterritorial regulation is barred by the federal constitution"); *McCormick v. Statler Hotels Delware Corp.*, 195 N.E.2d 172, 174 (Ill. 1963) ("legislation is presumptively territorial only and confined to the limits over which the law-making power has jurisdiction").

> the Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.

Id. (internal quotations and citation omitted).. These constitutional concepts apply with equal force to both legislative and judicial exercise of jurisdiction. As noted by this Court in *BMW of N. Am. v. Gore*: "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." 517 U.S. 559, 572 n.17 (1996).

The Oklahoma Supreme Court recognized that the issue before it was "whether the state has a right to enforce Native Wholesale Supply's compliance with state [cigarette] law." 237 P.3d at 210, App., 21a. Yet even within its boundaries, Oklahoma's power to regulate cigarettes is limited at best. For example, it cannot impose any advertising requirements or prohibitions based on smoking and health. *Lorillard*, 533 U.S. at 542. Similarly, Oklahoma is without authority to require that those shipping cigarettes into the state use delivery companies which provide recipient age verification. *Rowe*, 552 U.S. at 365. Oklahoma cannot regulate the type of cigarettes bought by Tribes located in the state, nor establish a minimum price. *Dep't of Taxation v. Milhelm Attea & Bros.*, 512 U.S. 61, 75 (1994) ("By imposing a quota on tax-free cigarettes, New York has not sought to dictate 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.' *Indian traders remain free to sell Indian tribes and retailers as many cigarettes as they wish, of any kind and at whatever price*" (emphasis supplied)). Nor does Oklahoma have

tax jurisdiction over the sale at issue in this case. Tellingly, although Native Wholesale never paid a penny in taxes to Oklahoma, there is no "tax evasion" alleged in the petition, an obvious concession that Oklahoma has no jurisdiction over Native Wholesale's out-of-state sales to the Muscogee Creek Tribe. *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 994 (2010) ("New York City . . . cannot, consistent with the Commerce Clause, compel Hemi Group, an out-of-state seller, to collect a City sales or use tax" *citing Quill Corp. v. N.D.*, 504 U.S. 298, 301 (1992) and *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753, 758 (1967)) (Ginsberg, J., concurring).

It would be ironic indeed if Oklahoma, which allows cigarette sales in the state, but is jurisdictionally impotent to control cigarette advertising, to regulate tobacco delivery through age verification inside Oklahoma, or to tax these out of state sales, could nevertheless extend its personal jurisdiction to an Indian reservation in New York to prohibit entirely a Native American wholesale company from selling a legal product to an Indian Tribe over which the State of Oklahoma has no jurisdictional power. *Cf. Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (if state does not prohibit, but merely regulates conduct, Tribes may engage in the conduct free of state regulatory oversight). Yet that is exactly the result reached by the Oklahoma Supreme Court below. Because Oklahoma has no such jurisdiction, this Court should issue a writ of certiorari to the Oklahoma Supreme Court and review the lower court's decision which is in direct conflict with decisions of this Court.

C. The Oklahoma Supreme Court's Decision Conflicts with this Court's Precedent Confirming That Out of State Business Activities Cannot Subject a Foreign Corporation to a State's Specific Personal Jurisdiction in Contract Based Cases.

It is a fundamental concept of due process that a state only has jurisdiction over non-residents to the extent of their activities within that state. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310 (1945); *Bonaparte v. Tax Ct.*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular"). As a result, activities of a non-resident defendant, legal where they occurred, and taking place outside a state seeking to exercise specific personal jurisdiction, are irrelevant and have no bearing on the existence *vel non* of the state's jurisdictional authority. *Accord BMW*, 517 U.S. at 572-73 ("Alabama does not have the power, however, to punish [defendant] for conduct that was lawful where it occurred"); *cf. Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort"). A defendant's business activities outside a forum state simply cannot have any impact on the scope of the forum state's jurisdictional power. That is particularly true regarding specific personal jurisdiction analysis, based as it must be on the specific minimum contacts necessary to give a state the power to force a foreign defendant to appear and defend claims against it.

Native Wholesale's operations outside of Oklahoma, both on the Seneca Nation and at the Foreign Trade

Zone in Las Vegas, Nevada, were legal activities where they occurred, and Oklahoma makes no claim to the contrary in its three petitions or anywhere else in its pleadings. Therefore, those operations have no bearing on the question of specific personal jurisdiction in Oklahoma. As this Court has confirmed:

> [I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound.

New York Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914).

The constitutional rights addressed by this Court in *International Shoe* apply with as much force today as they did at the time this Court rendered that decision, and those rights preclude forcing Native Wholesale to defend itself in a jurisdiction where it does not have the requisite minimum contacts.[16] *Accord Cote v. Wadel*, 796 F.2d 981, 984-85 (7th Cir. 1986) ("personal jurisdiction over nonresidents of a state is a quid for a quo that consists of the state's extending protection or

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[16] *Int'l Shoe*, 326 U.S. at 316; *see Shaffer*, 433 U.S. at 212 ("all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny").

other services to the nonresident . . . [L]itigants and the public will benefit substantially in the long run from better compliance with the rules limiting personal jurisdiction"); *Froning & Deppe, Inc. v. Cont'l Ill. Nat'l Bank & Trust Co.*, 695 F.2d 289, 294 (7th Cir. 1982) (allowing exercise of personal jurisdiction in Illinois "would positively *hinder* the underlying policies of the several states which favor the free flow of commerce") (emphasis in original).

Here, Oklahoma law confirms that all sales by Native Wholesale occurred either on the Seneca Nation when title passed to the Muscogee Creek Tribe, or in Nevada at the time and place of shipment. *Sesow v. Swearengen*, 552 P.2d 705, 707 (Okla. 1976).[17] *Accord Lindgregn v. GDT, LLC*, 312 F. Supp. 2d 1125, 1131-32 (S.D. Iowa 2004) (holding no personal jurisdiction existed in Iowa where both Iowa and California Uniform Commercial Code confirmed title passed in California "when [defendant] delivered the items to FedEx for shipment"). These sales were initiated by the Muscogee Creek Tribe and not Native Wholesale; and once title transferred shipment was conducted by a third party not involved in this case and acting the entire time as the agent of the Muscogee Creek Tribe. *Butler v. Beer Across Am.*, 83 F. Supp. 2d 1261, 1264 (Ala. 2000) (no personal jurisdiction where sale took place in the seller's state,

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[17] Under Oklahoma law, a "sale" is defined as the passing of title from the seller to the buyer for a price. Okla. Stat. tit. 12A § 2-106(1). Oklahoma law also recognizes that, in transactions such as those upon which the State seeks to exercise specific personal jurisdiction over Native Wholesale here, title to the goods passes from the seller to the buyer at the time and place of shipment. Okla. Stat. tit. 12A §2-401(2)(a).

and was shipped by a third party carrier "acting, the entire time, as the agent" of the buyer). No sales took place in Oklahoma, and Native Wholesale has not otherwise purposefully availed itself of the privilege of doing business in Oklahoma.

It would be contrary to this Court's long standing personal jurisdiction jurisprudence to force Native Wholesale to defend its Seneca Nation operations in Oklahoma based on contracts entered on the Seneca Nation in New York and performed there and in Nevada. Indeed, as this Court noted in *Hanson v. Denckla*:

> [a state] does not acquire [personal] jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the [defendant]. As we have indicated, they are insufficient to sustain the jurisdiction.

Hanson, 357 U.S. at 254.

Similarly, constitutional due process protections do not permit Oklahoma to exercise personal jurisdiction over this out of state vendor simply because the Muscogee Creek Nation has, of its own accord, brought the product it purchased back to its reservation within the exterior boundaries of Oklahoma. This Court consistently has confirmed that these types of actions by a third party cannot expose an out of state defendant to personal jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) ("unilateral activity of another party or a

third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction"); *accord Amsleep, Inc. v. Am. Mattress Ctrs., Inc.*, 2002 U.S. Dist. LEXIS 11665 (Ill. 2002) ("That a product sold in Defendant's Indiana location may someday be transported by an Illinois resident into Illinois does not convert Defendant's Indiana contacts into Illinois contacts").

Oklahoma wants to exercise its police powers to regulate an out of state sale made by an Indian to an Indian Tribe occurring on the Seneca Cattaraugus Indian Territory within the exterior boundaries of the State of New York. This Court's precedent confirms that Due Process protections prohibit it from doing so. The Oklahoma Supreme Court disagrees, requiring this Court's review of its decision on writ of certiorari.

II. THE OKLAHOMA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. Unable to Stop the Muscogee Creek Tribe From Buying Goods Directly, Oklahoma Seeks to Regulate Indian Commerce by Suing the Indian Company From Which the Tribe Buys Its Out of State Goods.

Regulating Trade "with the Indian Tribes" is the most fundamental power granted to the United States

Congress by the Indian Commerce Clause.[18] Allowing a state to usurp that exclusive congressional power through state regulation - and a state court injunction - controlling a Tribe's purchase of goods from Indians out of state not only ignores the plain meaning of the Indian Commerce Clause, it undermines comprehensive federal statutory schemes adopted by Congress under its Indian Commerce Clause powers,[19] and eviscerates centuries of this Court's jurisprudence

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[18] "Congress in the exercise of its power granted in Art. I, § 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject." *Warren Trading Post Co. v. Ariz. Tax Comm'n*, 380 U.S. 685, 692 n.18 (1965).

[19] *E.g.*, 19 Stat. 200, 25 U.S.C. § 261 ("The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." *See also* 4 Stat. 729, now 25 U.S.C. § 263 (empowering the President in the public interest to forbid introduction of any or all goods into the territory of a tribe, and to revoke and refuse all licenses to trade with that tribe); 4 Stat. 729, as amended, now 25 U.S.C. § 264 (establishing penalties for trading without a license and forbidding traders to hire white persons as clerks unless licensed to do so); 18 U.S.C. § 3113 (forbidding unlawful introduction of liquor into Indian country and providing for revocation of the license of any trader violating this prohibition).

on this very subject.[20] Yet that is exactly what the Oklahoma Supreme Court did in its decision below.

Oklahoma knows its courts cannot enjoin the Muscogee Creek Tribe from purchasing goods from other Indians out of state.[21] Indeed, not only is there no reported case allowing states to regulate an Indian tribe's purchases absent congressional authorization, just the opposite is true. *Warren Trading Post Co. v. Ariz. Tax Comm'n*, 380 U.S. 685, 690 (1965) ("Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders"); *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of

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[20] "As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms, they shall deal, and what articles shall be contraband." *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 195 (1876); *see also United States v. Mazurie*, 419 U.S. 544, 554 (1975) ("This Court has repeatedly held that [the Indian Commerce] clause affords Congress the power to prohibit or regulate the sale of alcoholic beverages to tribal Indians, wherever situated, and to prohibit or regulate the introduction of alcoholic beverages into Indian country").

[21] *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 170-71 (1973) ("[state] laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply"); *Indian Country, U.S.A., Inc. v. Okla.*, 829 F.2d 967, 987 (10th Cir. 1987). ("[T]he treaties with the Creek Nation as well as traditional presumptions favor the exclusion of state law from Creek Nation lands").

Indians on a reservation").[22] As a result, congressional permission is required before states can regulate the sale of liquor, apply state health and education laws, or regulate similar activities by Indians on reservation.[23]

No doubt frustrated by its inability to regulate purchases of goods by a Tribe over which it has no police power, Oklahoma's Attorney General asked the Oklahoma state courts to enjoin the Tribe's out of state seller from doing business with the Muscogee Creek Tribe. In doing so, the Attorney General sought to accomplish through the back door what he could not accomplish through the front: prohibit the Muscogee Creek Tribe from purchasing a specific brand of an otherwise legal product by suing the Tribe's out of state Indian wholesale distributor, which operates on a reservation within the exterior boundaries of the State of New York. The Oklahoma district court

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[22] This Court has recognized limited state jurisdiction over non Indians operating on reservation, but has never recognized any state power to regulate from whom Indian Tribes can purchase goods absent congressional enactment. *Mazurie*, 419 U.S. at 558 ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it").

[23] *E.g.*, 18 U.S.C. § 1161 (permitting application of state liquor law standards within an Indian reservation under certain conditions); 25 U.S.C. § 231 (permitting application of state health and education laws within a reservation under certain conditions); 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (respectively granting certain states criminal and civil jurisdiction over offenses and causes of action involving Indians within specified Indian reservations).

properly recognized that it had no subject matter jurisdiction to hear the Indian commerce claims asserted by the State's Attorney General, and granted Native Wholesale's motion to dismiss. In reversing that decision, the Oklahoma Supreme Court held: (1) that Native Wholesale "is not clothed with tribal immunity;"[24] and (2) "there is no blanket ban on state regulation of inter-tribal commerce even on a reservation" (without citation to any legal authority in support).[25]

It is on this second issue, application of the Indian Commerce Clause to on reservation intertribal commerce, that the Oklahoma Supreme Court misapplied the Indian Commerce Clause and misinterpreted this Court's decisions addressing the scope of that constitutional provision. In doing so, the Oklahoma Supreme Court relied upon this Court's decisions holding that states may require a tribe to collect taxes for the state on *sale* of goods to non tribal members.[26] The Oklahoma Supreme Court never addressed, and indeed ignored, Indian Commerce Clause protections enjoyed by a tribe *purchasing* goods, which was the case before it.

This second issue, whether a state can prohibit an Indian tribe located within its boundaries from leaving

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[24] 237 P.3d at 210, App., 23a.

[25] 237 P.3d at 215-16, App., 36a.

[26] *E.g., citing Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480 (1976) (tax on sale of cigarettes to non-tribal members), 237 P.3d at 212, 213, 214, App., 27a, 30a, 31a.

the state to purchase goods from Indians on a reservation outside the state, is an important question of federal law that has not, but should be, addressed by this Court on writ of certiorari to the Oklahoma Supreme Court. *Williams*, 358 U.S. at 218 ("Because this was a doubtful determination of the important question of state power over Indian affairs, we granted certiorari").

B. The Power to Regulate Indian Commerce Between Tribes Lies Exclusively in Congress.

Oklahoma is jurisdictionally impotent to regulate commerce of any kind occurring completely outside of its boundaries. *E.g., BMW*, 517 U.S. at 572-73 ("Alabama does not have the power, however, to punish [defendant] for conduct that was lawful where it occurred"). This prohibition applies with greater force here, given that Oklahoma's attempt at extraterritorial regulation involves prohibiting purchases by an Indian tribe from an Indian vendor doing business in Indian Territory outside Oklahoma. The United States Constitution vests that regulatory authority exclusively in Congress. U.S. Const. art. I, § 8, cl. 3. In interpreting this Constitutional delegation of power exclusively to Congress, this Court has confirmed:

> [T]he Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but the States

> have been divested of virtually all authority over Indian commerce and Indian tribes.

Seminole Tribe v. Fla., 517 U.S. 44, 62 (1996). The divestiture of state authority accomplished by the Indian Commerce Clause is confirmed in its historical underpinnings.[27]

Under the Indian Commerce Clause, intertribal trade and commerce between Indian nations has long been encouraged by the federal government free from state regulation. Not only has Congress never passed legislation authorizing the incursion into Indian commerce Oklahoma seeks here, just the opposite is true: Congress repeatedly has recognized and encouraged trade between Indians free of state regulation. *See, e.g.*, Native American Business Development Act, 25 U.S.C. § 4301(b)(5). In early statutes regulating interactions with Indians and tribes, Congress recognized and encouraged trade between Indians, and specifically exempted Indians trading with other Indians from the scope of federal regulation. 25 U.S.C. §§ 261-264 (placing restrictions on "any person other than an Indian" attempting to engage in trade or commerce "with the Indians on any

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[27] "The conduct of Indian affairs under the Articles of Confederation suffered because of conflicts between federal and state authority." Francis Paul Prucha, Documents of United States Indian Policy 10-11 (3d ed. 2000) p. 10. "[T]here was fundamental agreement that Indian affairs was one area that belonged to the central government." Francis Paul Prucha, American Indian Policy in the Formative Years (1962) p. 29. From the start, the objective was not merely to confer power on the national government to manage Indian affairs, but to disable the colonies or States from doing so. *(Ibid.)*

Indian reservation"). In addition, Congress recognized a tribe's authority to engage in tribal commerce when it passed the Native American Business Development, Trade Promotion, and Tourism Act, 25 U.S.C. §§ 4301 *et seq*. Congress passed that Act not only to recognize, but also "to encourage intertribal . . . trade and business development." 25 U.S.C. § 4301(b)(5).

Only Congress can regulate the right of tribes to engage in Indian commerce with other tribes. Here, the Oklahoma Supreme Court's decision sanctioning that State's lawsuit against Native Wholesale directly interferes with this congressional power, and unduly burdens Indian commerce, all in violation of the Indian Commerce Clause.

C. Federal Law Preempts the State Regulations at Issue in This Case.

Federal preemption of state law as applied to Indian reservations is not controlled by the standards of preemption in other areas of law. Instead, the analysis requires a particularized examination of the relevant federal, state, and tribal interests, including the federal trust responsibility and the tribal interest in promoting economic development, self-sufficiency and strong tribal government. As this Court has confirmed:

> [T]he traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis that governs this inquiry. Relevant federal statutes and treaties must be examined in light of 'the broad

> policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence.' As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity.

Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 838 (1982) (citations omitted).

When on reservation conduct involving only Indians is at issue, state law cannot be enforced, for the state's interest is minimal and the federal interest in encouraging tribal self-government is at its strongest. *White Mtn. Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980); *Moe*, 425 U.S. at 480-83; *McClanahan*, 411 U.S. at 171-72. In *Moe*, this Court held that vendor licensing fees the state sought to impose upon reservation Indians were preempted. *Moe*, 425 U.S. at 480-81. Here, similar to the vendor licensing fees this Court rejected in *Moe*, the burden falls on Indians conducting on reservation business, and the state regulation cannot be enforced because the state is regulating the Muscogee Creek Tribe (not non-Indian consumers), and is doing so by dictating those businesses from which the Tribe can purchase goods outside Oklahoma. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-59 (1995); *Central Machinery Co. v. Ariz. St. Tax Comm'n* 448 U.S. 160 (1980) (state law imposing burdens upon reservation traders cannot be enforced); *Bracker*, 448 U.S. at 144-45.

The state law here, seeking to dictate from whom the Muscogee Creek Tribe can purchase goods, is preempted. Indeed, because selling cigarettes is not illegal in Oklahoma, and because the cigarettes bought by the Muscogee Creek Tribe comply with federal regulatory requirements, Oklahoma has no authority to regulate the brands of cigarettes the Tribe can purchase from out of state Indians. *Cabazon*, 480 U.S. at 207-10 (California cannot prevent activity on tribal land not prohibited, but only regulated, by the state); *accord Milhelm Attea & Bros.*, 512 U.S. at 75 ("By imposing a quota on *tax-free* cigarettes, New York has not sought to dictate 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.' *Indian traders remain free to sell Indian tribes and retailers as many cigarettes as they wish, of any kind and at whatever price*" (emphasis added)).

Oklahoma's decision not to prohibit cigarettes, but instead to regulate the kind and price, cannot be enforced to prohibit Native Wholesale from trading with the Muscogee Creek Tribe. The State's attempt to do so is preempted by federal law. *Milhelm Attea & Bros., supra.* In holding to the contrary, the Oklahoma Supreme Court ignored this Court's controlling decisions, and instead opined that the State of Oklahoma has the authority to regulate *the product brand* of an otherwise legal product that can be purchased by the Muscogee Creek Tribe from Indians in a transaction occurring entirely outside Oklahoma. The Oklahoma Supreme Court's decision incorrectly decided this important question of federal law that has not, but should be, addressed instead by this Court on writ of certiorari to the Oklahoma Supreme Court.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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APPENDIX

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APPENDIX A

THE SUPREME COURT OF THE STATE OF OKLAHOMA

2010 OK 58
Case Number: 107241

[Decided July 6, 2010]

STATE OF OKLAHOMA ex rel.
W. A. "DREW" EDMONDSON,
ATTORNEY GENERAL OF OKLAHOMA
Appellant,

v.

NATIVE WHOLESALE SUPPLY,
a Corporation chartered by the
Sac and Fox Tribe of Oklahoma,
Appellee

ON APPEAL FROM THE DISTRICT COURT IN OKLAHOMA COUNTY

¶0 The State of Oklahoma brought this proceeding against Native Wholesale Supply, a cigarette importer and distributor, alleging violations of the Oklahoma Master Settlement Agreement Complementary Act. Native Wholesale Supply moved to dismiss the suit for lack of personal and subject matter jurisdiction. The District Court, Bryan C. Dixon, trial judge, denied the

motion as to personal jurisdiction, but entered judgment for defendant upon finding that enforcement of the Complementary Act against defendant would violate the Indian Commerce Clause, depriving the trial court of subject matter jurisdiction. Both parties appealed. Upon the State's motion, the matter stands retained for this court's disposition.

THE TRIAL COURT'S JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART AND THE CAUSE IS REMANDED FOR FURTHER PROCEEDINGS TO BE CONSISTENT WITH THIS OPINION.

E. Clyde Kirk, Assistant Attorney General, Oklahoma City, OK, for Appellant
Robert N. Sheets and Marc Edwards, PHILLIPS MURRAH P.C., Oklahoma City, OK, for Appellee[1]

OPALA, J.

¶1 This appeal presents two dispositive issues for the court's resolution: (1) Is an Oklahoma court a constitutionally sanctioned forum for the exercise of personal jurisdiction to adjudicate an alleged violation of a state statute by Native Wholesale Supply, a nonresident corporation that claims to have no minimum contacts with Oklahoma? and (2) Does federal law bar Oklahoma from enforcing the Complementary Act against Native Wholesale Supply,

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[1] Identified herein are only those counsel for the parties who have entered an appearance in this cause (as required by Okla. Sup. Ct. Rule 1.5(a), 12 O.S.2001, Ch. 15, App.1) or whose names appear on the appellate paperwork.

a tribally-chartered corporation wholly owned by an individual of Native-American ancestry? We answer the first question in the affirmative and the second in the negative.

I
THE ANATOMY OF LITIGATION

¶2 On 23 November 1998 forty-six states, including Oklahoma, entered into an agreement with the four largest American tobacco product manufacturers settling litigation brought by the settling states to recoup from the manufacturers health care expenses incurred by the states as a result of cigarette smoking. The terms of this agreement (the "Master Settlement Agreement" or "MSA") require each participating tobacco product manufacturer to make an annual payment to each settling state computed in relation to that manufacturer's volume of cigarette sales in the state. In return, the MSA requires the states to release past, present and certain future claims against the manufacturers.

¶3 In order to prevent tobacco manufacturers not participating in the MSA from gaining a cost advantage over the settling manufacturers and to provide the states with a source of money from which to recover tobacco-related health care costs attributable to the sales of cigarettes by non-participating manufacturers, the MSA calls for each settling state to enact and enforce a statute (a "qualifying statute") requiring all tobacco manufacturers not participating in the MSA who sell cigarettes in a state to make annual payments into an

escrow account based on the manufacturer's relative market share in such state.[2]

¶4 Soon after passage of their qualifying statutes, it became clear to the states that non-participating cigarette manufacturers were evading their escrow obligation. Oklahoma, along with several other states, responded to this noncompliance by enacting complementary enforcement legislation. Known as the Master Settlement Agreement Complementary Act ("Complementary Act")[3], this legislation obligates all tobacco product manufacturers whose products are sold in Oklahoma to provide the Attorney General's office with an annual certification that the manufacturer has either signed on to participate in the MSA or is fully compliant with the qualifying statute's escrow requirement.[4] The Complementary Act requires

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[2] *See* the provisions of 37 O.S. Supp. 2003 §600.23 for the terms of Oklahoma's qualifying statute, which is part of the Prevention of Youth Access to Tobacco Act, 37 O.S. 2001 §600.1 *et seq.*

[3] *See* the provisions of 68 O.S. Supp. 2004 §360.1 *et seq.*

[4] *See* the provisions of 68 O.S. Supp. 2004 §360.4(A)(1) which state:
"Every tobacco product manufacturer whose cigarettes are sold in this state, whether directly or through a distributor, retailer or similar intermediary or intermediaries, shall execute and deliver on a form or in the manner prescribed by the Attorney General a certification to the Oklahoma Tax Commission and Attorney General, no later than April 30 of each year, certifying under penalty of perjury that, as of the date of certification, the tobacco product manufacturer either: (a.) is a participating manufacturer, or (b.) is in full compliance with the provisions of Sections 600.21 through 600.23 of Title 37 of the Oklahoma Statutes."

The provisions of 37 O.S. Supp. 2003 §600.23, which set out the

the Attorney General's Office to publish on its website an annual list of all non-participating tobacco product manufacturers who have complied with the certification requirement[5] and met their escrow obligation.[6] This information is thus in the public domain and readily available.

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obligations underlying the certification requirement, state in pertinent part:
"A. Any tobacco product manufacturer selling cigarettes to consumers within the state, whether directly or through a distributor, retailer or similar intermediary or intermediaries, after July 1, 1999, shall do one of the following:
1. Become a participating manufacturer, as that term is defined in Section II(jj) of the Master Settlement Agreement, and generally perform its financial obligations under the Master Settlement Agreement; or
2. Place into a qualified escrow fund, by April 15 of the year following the year in question, the following amounts, as such amounts are adjusted for inflation: . . ."

[5] *See* the provisions of 68 O.S. Supp. 2004 §360.4(B)(1), which state:
"Not later than ninety (90) calendar days after this act takes effect, the Attorney General shall develop and publish on its website a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of [this section].

[6] *Id.* at §360.4(B)(3), which states:
"Neither a tobacco product manufacturer nor brand family shall be included or retained in the directory if the Attorney General concludes, in the case of a nonparticipating manufacturer, that:

a. any escrow payment required pursuant to Section 600.23 of Title 37 of the Oklahoma Statutes for any period for any brand family, whether or not listed by the nonparticipating manufacturer, has not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the Attorney General, . . ."

¶5 The Complementary Act also makes it unlawful for any person to "sell or distribute . . . or acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the State in violation of the Complementary Act."[7] Upon finding a violation of the Complementary Act, a court may order "any profits, gain, gross receipts, or other benefit from the violation to be disgorged and paid to the State Treasurer for deposit in the Tobacco Settlement Endowment Trust Fund."[8] The State, if victorious, is also entitled to recover costs and a reasonable attorney's fee."[9]

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[7] *See* the provisions of 68 O.S. Supp. 2004 §360.7(E), which state: "1. It shall be unlawful for a person to:
a. sell or distribute cigarettes, or
b. acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the state in violation of the Master Settlement Agreement Complementary Act. A violation of the act shall be a misdemeanor."

[8] *See* the provisions of 68 O.S. Supp. 2004 §360.8(G), which state: "If a court determines that a person has violated the Master Settlement Agreement Complementary Act, the court shall order any profits, gain, gross receipts, or other benefit from the violation to be disgorged and paid to the State Treasurer for deposit in the Tobacco Settlement Endowment Trust Fund. Unless otherwise expressly provided, the remedies or penalties provided by the Master Settlement Agreement Complementary Act are cumulative to each other and to the remedies or penalties available under all other laws of this state."

[9] *See* the provisions of 68 O.S. Supp. 2004 §360.8(F), which state: "In any action brought by the state to enforce the Master Settlement Agreement Complementary Act, the state shall be en-

¶6 The Attorney General brought this proceeding against Native Wholesale Supply in the District Court, Oklahoma County, alleging that the Company violated the Complementary Act when it sold, distributed, acquired, held, owned, possessed, transported, imported, or caused to be imported for sale in Oklahoma Seneca brand cigarettes knowing (a) that they were intended for distribution or sale in the state and (b) their manufacturer was not listed on the Attorney General's Directory of manufacturers who have complied with the requirements of the Complementary Act.

¶7 Native Wholesale Supply moved for dismissal based on lack of personal and subject matter jurisdiction. The trial court ruled that Native Wholesale Supply had sufficient "minimum contacts" with the State of Oklahoma to warrant the exercise of personal jurisdiction, but dismissed the proceeding on the grounds that enforcement of the Complementary Act against Native Wholesale Supply would violate the Indian Commerce Clause of the United States Constitution.

¶8 Native Wholesale Supply has appealed from the trial court's decision on personal jurisdiction; the Attorney General has appealed from the trial court's ruling on subject matter jurisdiction. On motion by the State, the appeals stand retained for this court's disposition. We now affirm the trial court's decision as to personal jurisdiction, reverse its ruling as to subject

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titled to recover the costs of investigation, expert witness fees, costs of the action, and reasonable attorney fees."

matter jurisdiction, and remand the cause for further proceedings to be consistent with this opinion.

II
STANDARD OF REVIEW

¶9 The dispositive issues to be decided are both questions of law. They call for a legal conclusion to be governed by a *de novo* standard of appellate review.[10] When reexamining a trial court's legal rulings, an appellate court exercises plenary, independent and non-deferential authority.[11]

III
IN PERSONAM JURISDICTION OVER A NON-RESIDENT DEFENDANT

¶10 We begin by addressing whether Native Wholesale Supply has a sufficient affiliation with this State to support her courts' exercise of personal jurisdiction over it. *In personam* jurisdiction refers to the power of the court to render a binding judgment against a defendant.[12] To establish personal jurisdiction over a

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[10] Booth v. McKnight, 2003 OK 49, ¶12, 70 P.3d 855, 860.

[11] *Id.*, *citing* Kluver v. Weatherford Hosp. Auth., 1993 OK 85, ¶14, 859 P.2d 1081, 1083 (stating that "[i]ssues of law are reviewable by a de novo standard and an appellate court claims for itself plenary, independent, and non-deferential authority to reexamine a trial court's legal rulings" and *citing* Salve Regina College v. Russell, 499 U.S. 225, 231, 111 S. Ct. 1217, 1221, 113 L. Ed.2d 190 (1991)).

[12] Gilbert v. Security Finance Corp. of Okla., Inc., 2006 OK 58, ¶16, 152 P.3d 165, 173; Conoco Inc., V. Agrico Chemical Co., 2004 OK 83, ¶16, 115 P.3d 829, 834.

non-resident defendant, both the State's long-arm statute[13] and the requirements of federal due process[14] must be satisfied. We have interpreted our long-arm statute as extending the jurisdiction of the Oklahoma courts to the outer limits of due process.[15] The jurisdictional analysis therefore comes down to a single determination of whether the exercise of personal jurisdiction comports with federal due process. The outer limits of due process for this purpose have been established by the United States Supreme Court.[16]

¶11 The Due Process Clause precludes the issuance of a binding judgment in a forum with which a defendant has established no meaningful contacts, ties, or relations.[17] There must ' "minimum contacts" between the out-of-state defendant and the forum so

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[13] *See* the provisions of 12 O.S. 2001 §2004(F), which state: "A court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States."

[14] The Due Process Clause of the United States Constitution, U.S. Const. amend. XIV, §1, provides that no state shall . . . "deprive any person of life, liberty, or property, without due process of law; . . ."

[15] Conoco Inc., *supra* note 12 at ¶17, at 834 ("The intent of our long-arm statute is to extend the jurisdiction of the Oklahoma courts to the outer limits permitted by the Oklahoma Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.").

[16] *Id.*

[17] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72, 105 S. Ct. 2174, 2181, 85 L. Ed.2d 528 (1985).

that litigation in the forum does not offend traditional notions of fair play and substantial justice.[18] A nonresident corporation must purposefully direct its activities toward forum residents, thereby invoking on behalf of those activities the benefits and protections of the forum's laws.[19] This requirement "ensures that a defendant will not be haled into a jurisdiction's courts solely as a result of random, fortuitous, or attenuated contacts"[20] or based on "the unilateral activity of another party or a third person."[21] Whether due process is satisfied depends upon the quality and nature of the defendant's alleged activity in the forum considered in the context of the fair and orderly inistration of the laws.[22]

¶12 A court's jurisdiction to render a binding personal judgment historically required the person's physical presence within the territorial jurisdiction of the court.[23] While state lines remain relevant for jurisdictional purposes, the Supreme Court has

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[18] Conoco, *supra* note 12 at ¶18, at 834-35, *citing* Int'l Shoe Co. v. Washington., 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945).

[19] Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct.1228, 1240, 2 L Ed.2d 1283 (1958).

[20] Burger King, *supra* note 17 at 475, 105 S. Ct. At 2183 (internal quotation marks omitted).

[21] Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417, 104 S. Ct. 1868, 1873, 80 L. Ed.2d 404 (1984).

[22] Int'l Shoe, *supra* note 18 at 319, 66 S. Ct. at 160.

[23] Pennoyer v. Neff, 95 U.S. 714, 733, 24 L. Ed. 565 (1877).

gradually relaxed the limits placed on state jurisdiction by the Due Process Clause. It has done so explicitly in recognition of the increasingly interstate character of commerce and technological innovations in transportation and communication that make defense of a suit in a foreign jurisdiction less burdensome.[24]

¶13 Illustrative of this relaxation is the stream-of-commerce theory of personal jurisdiction, first pronounced by the Supreme Court's dictum in *World-Wide Volkswagen Corp. v. Woodson*.[25] Under the stream-of-commerce analysis, a state does not violate the precepts of due process if it asserts personal jurisdiction over a corporation that engages in conduct outside the forum that results in goods moving in the stream of commerce into the forum.[26] As the Court in *Woodson* explained,

"The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[27]

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[24] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293, 100 S. Ct. 559, 565, 62 L. Ed.2d 490 (1980), *quoting* McGee v. International Life Ins. Co., 355 U.S. 220, 222-23, 78 S. Ct. 199, 201, 2 L. Ed.2d 223 (1957).

[25] *See supra* note 24.

[26] *Id.* at 297-98, 100 S. Ct. at 567.

[27] *Id.*

¶14 *Woodson* did not present facts calling for the application of the stream-of-commerce analysis and when the Court next addressed the requirements of the theory in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*,[28] it was unable to agree on precisely what conduct by a defendant would suffice to support a forum's exercise of personal jurisdiction under the stream-of-commerce analysis. Justice O'Connor and three other justices, delivering the judgment of the Court, opined that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."[29] A plaintiff must show additional conduct by the defendant directed toward the forum to support the exercise of jurisdiction consistent with the Due Process Clause.[30]

¶15 Four other justices in a separate writing authored by Justice Brennan saw no need to require additional conduct from a defendant once that defendant intentionally placed a product into the stream of commerce because the metaphorical notion that there is a stream in which commerce flows embodies the idea of purposefulness. "The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to

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[28] 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed.2d 92 (1987).

[29] *Id.* at 112, 107 S. Ct. at 1032. Joining Justice O'Connor in the portion of the opinion dealing with minimum contacts were Chief Justice Rehnquist and Justices Powell and Scalia.

[30] *Id.*

distribution to retail sale."[31] A participant in this process who is aware that the product with which he or she is connected will be marketed in the forum state cannot claim surprise when summoned to court in that forum or claim that he or she is being subjected to a burden in the forum without a corresponding benefit.[32]

¶16 Still another writing in *Asahi*, authored by Justice Stevens, declared that, although it was unnecessary to reach the question of minimum contacts, it was their considered opinion that a regular course of dealing that results in deliveries of a large quantity of a product annually over a period of several years would satisfy the "purposeful availment" requirement.[33] Because Justice Stevens could discern "no unwavering line . . . between 'mere awareness' that a component will find its way into the forum State and 'purposeful availment' of the forum's market," he advocated that the volume, the value, and the inherent dangerousness of the product be taken into account in determining whether a defendant's conduct amounted to purposeful availment of the forum.[34]

¶17 The *Asahi* decision has created significant confusion in lower courts over the constitutional

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[31] *Id.* at 117, 107 S. Ct. at 1034 (Brennan, J., concurring in part and concurring in judgment, joined by White, Marshall and Blackmun, JJ.).

[32] *Id.*

[33] *Id.* at 122, 107 S. Ct. 1037 (Stevens, J., joined by Justices White and Blackmun, concurring in part and concurring in judgment).

[34] *Id.*

standard for minimum contacts under the stream-of-commerce theory.[35] Most courts that have addressed this problem have approached it as a choice between Justice O'Connor's "stream-of-commerce plus" version of the analysis and Justice Brennan's less rigorous standard. Generally overlooked is the fact that between the Brennan-and Stevens-authored writings, five justices in *Asahi* rejected Justice O'Connor's view. We have not heretofore chosen between these conflicting versions of the stream-of-commerce theory and we need not wade into that swamp today because Native Wholesale Supply has engaged in conduct that satisfies even the rigorous criterion advocated by Justice O'Connor. If the Company's conduct meets that test, then by definition it must exceed the conduct required by the other five justices in *Asahi* to satisfy due process.

¶18 In assessing Native Wholesale Supply's conduct under the O'Connor approach in *Asahi*, it is important to keep in mind that the underlying claim in *Asahi* was the liability of Asahi Metal, a Japanese manufacturer, for personal injuries allegedly caused by a defective motorcycle tire manufactured by a

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[35] Commissariat A L'Energie Atomique v. Chi Mei Optoelectronics, 395 F.3d 1315, 1322 (C. A. Fed. 2005) (recognizing that the circuit courts of appeal have not agreed on the proper due process standard under the stream-of-commerce analysis; *comparing* Bridgeport Music, Inc. v. Still N the Water Publ'g, 327 F.3d 472, 479-80, (6th Cir.2003) (adopting Justice O'Connor's "stream-of-commerce 'plus'" theory) *with* Dehmlow v. Austin Fireworks, 963 F.2d 941, 947 (7th Cir.1992) (applying Justice Brennan's approach because a majority of the Court has never rejected it) and Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 614 (8th Cir. 1994) (same).

Taiwanese corporation using a part supplied by Asahi Metal. Asahi Metal had no contacts, directly or indirectly, with anyone in the forum state, it did not sell the component part in the United States apart from the finished product manufactured by another party, and it played no part in the distribution or sale of the finished product in the forum state. On these facts, Justice O'Connor indicated that there was nothing to tie Asahi Metal to the forum state beyond the mere happenstance that the stream of commerce had swept the finished product into the forum state in response to the actions of an independent third party. Justice O'Connor suggested that Asahi Metal might have had sufficient contacts with the forum state if it had created, controlled, or even just employed the distribution system that brought the product into the forum state.[36] It did not do even this, leaving Justice O'Connor to conclude that it had not purposefully availed itself of the market in the forum state.[37]

¶19 Native Wholesale Supply imports Seneca brand cigarettes from Grand River Enterprises Six Nations, LTD, a tribally-owned, Canadian-chartered tobacco product manufacturer that conducts operations in Canada. The imported cigarettes are stored in several locations in the United States, including the Free Trade Zone in Las Vegas, Nevada. Native Wholesale Supply then sells the cigarettes to tribal entities in the

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[36] *Id.*

[37] *Id.*

United States. One such tribal entity is Muscogee Creek Nation Wholesale in Oklahoma.[38]

¶20 According to the president and sole shareholder of Native Wholesale Supply, a sales transaction between it and Muscogee Creek Nation Wholesale begins when the latter places an order with Native Wholesale Supply. Native Wholesale Supply then releases the cigarettes from storage and participates in arranging for their shipment by truck to the business location of Muscogee Creek Nation Wholesale, who then resells the cigarettes to tribal retailers. The Attorney General does not dispute that some of these retailers are located on tribal land of the Muscogee Creek Nation, but he has alleged that large quantities of Seneca cigarettes have been found for sale at smoke shops located off the tribal land. In any event, the retailers sell Seneca cigarettes to the general public in Oklahoma.

¶21 The State alleges that over a fifteen-month period *more than one hundred million cigarettes worth more than eight million dollars* were sold into the Oklahoma market through this process. The evidentiary material tendered by the Attorney General supports this allegation, at least up to several million cigarettes, and Native Wholesale Supply does not dispute that it markets a high volume of Seneca cigarettes to

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[38] Because no evidentiary material was tendered showing the tribal identity of Muscogee Creek Nation Wholesale or the location of its business operation, we are left to infer those facts from the tribal wholesaler's use of the Muscogee Creek Nation in its name and from the affidavit of Native Wholesale Supply's president in which he says that Native Wholesale Supply does business solely with tribal entities on tribal land.

Muscogee Creek Nation Wholesale as part of an on-going business relationship between the two entities. The expected demand for cigarettes by members of the Muscogee Creek Nation, according to national statistics provided by the Attorney General in the petition, is a small fraction of the number of cigarettes sold by Native Wholesale Supply to Muscogee Creek Nation Wholesale. Native Wholesale Supply does not dispute the veracity of these statistics.

¶22 Native Wholesale Supply claims it is not directing these millions of cigarettes at the Oklahoma market at all. It argues that it intends for all the cigarettes it sells to the tribal wholesaler to be sold only to reservation Indians and that it demonstrates this intent by placing a stamp on each package of Seneca cigarettes that says "for reservation sales only." If cigarettes happen to be sold by the tribal wholesaler to off-reservation retailers or if cigarettes are made available by tribal retailers to the general public in Oklahoma, those acts are not attributable to Native Wholesale Supply as acts by it purposefully directed at the Oklahoma cigarette market.

¶23 Whereas Justice O'Connor in *Asahi* was evaluating the contacts of a component parts manufacturer whose only relevant relationship was with another manufacturer in Taiwan, we are looking here at a distributor of a finished product - cigarettes - who causes the product to be delivered to an entity in this state in such quantities that its ultimate destination can only be the general public in this state. While the entity with which Native Wholesale Supply directly deals may operate on tribal land, that tribal land is not located in some parallel universe. It is geographically within the State of Oklahoma. Both

entities are engaged in an enterprise whose purpose is to serve the Oklahoma market for cigarettes.

¶24 This is not a case where the defendant is merely aware that its product might be swept into this State and sold to Oklahoma consumers. The sheer volume of cigarettes sold by Native Wholesale Supply to wholesalers in this State shows the Company to be part of a distribution channel for Seneca cigarettes that intentionally brings that product into the Oklahoma marketplace. Native Wholesale Supply is not a passive bystander in this process. It reaps a hefty financial reward for delivering its products into the stream of commerce that brings it into Oklahoma. To claim, as Native Wholesale Supply does, that it does not know, expect, or intend that the cigarettes it sells to Muscogee Creek Nation Wholesale are intended for distribution and resale in Oklahoma is simply disingenuous.

¶25 In short, Native Wholesale Supply does not "merely set its products adrift on a stormy sea of commerce which randomly [sweeps] the products into" Oklahoma.[39] They arrive here by the purposeful collective acts of the Company and the tribal wholesalers with whom it does business. We hence hold that the minimum contacts segment of due process analysis is satisfied.

¶26 The presence of minimum contacts does not end the due process inquiry. "Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be

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[39] Dehmlow v. Austin Fireworks, 963 F.2d 941, 948 (7th Cir. 1992).

considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'"[40] In determining whether the exercise of jurisdiction comports with "fair play and substantial justice," we must evaluate the following factors: (1) the burden on the defendant of mounting a defense in the forum State, (2) the interests of the forum State, (3) the plaintiff's interest in obtaining relief, and (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several States in furthering fundamental substantive social policies.[41] *Considering Native Wholesale Supply's contacts with the State in light of these factors, we conclude that the exercise of personal jurisdiction in Oklahoma satisfies due process.*

¶27 First, the interest of the State in adjudicating this matter in Oklahoma is obviously very strong. The integrity of the Master Settlement Agreement depends on the ability of the State to enforce its terms. A decision adverse to the state on this issue would permit cigarette manufacturers and wholesalers to evade the MSA by setting up distribution networks whose participants pose as fully independent entities engaging in carefully structured transactions that ostensibly take place outside of the State. In this way, tobacco manufacturers and merchants could purposefully, albeit indirectly, target cigarettes at

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[40] Burger King Corp. v. Rudzewicz, *supra* note 17 at 476, 105 S. Ct. at 2174, *citing* Int'l Shoe, *supra* note 18 at 320, 66 S. Ct. at 160.

[41] Asahi, *supra* note 28 at 113, 107 S. Ct. at 1033.

Oklahoma, reaping the economic benefit of engaging in the tobacco industry while evading the public policy embodied in the MSA and the Complementary Act of shifting the burden of tobacco-related health care costs from the State to the entities who profit from the smoking enterprise.

¶28 Second, defending this suit in Oklahoma does not present an undue burden on Native Wholesale Supply. Any burden upon Native Wholesale Supply from mounting a defense in Oklahoma is clearly minimal in light of the State's uncontroverted allegation that the Company reaps millions of dollars from the sale of Seneca cigarettes to Oklahoma consumers.

¶29 Finally, the states have a collective interest in the efficient resolution of controversies and in furthering fundamental substantive social policies. The courts of this State and only the courts of this State offer the most efficient and rational forum for the resolution of a controversy over the meaning and effect of State statutes governing the allocation of the financial and health-care costs associated with smoking between the public and private sectors.

IV
THE INDIAN COMMERCE CLAUSE DOES NOT BAR ENFORCEMENT OF THE COMPLEMENTARY ACT AGAINST NATIVE WHOLESALE SUPPLY

¶30 Native Wholesale Supply is a corporation chartered by the Sac and Fox Nation. Its president and sole shareholder is a person of Native-American ancestry. The trial court ruled that the Indian Commerce Clause bars the relief sought by the State

against this company. That decision could rest on the doctrine of tribal immunity from suit or, alternatively, it could rest on the Indian Commerce Clause as a bar to the application of the state's substantive law to Native Wholesale Supply. The former goes to whether the state has a remedy against Native Wholesale Supply for violation of the Complementary Act; the latter goes to whether the state has a right to enforce Native Wholesale Supply's compliance with state law.[42]

¶31 Suits against Indian *tribes* are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.[43] This immunity from suit extends to *a tribe's commercial as well as to its governmental activities*[44] and protects the tribe or tribal entity regardless of whether its activities take place on or off a reservation.[45] Despite the breadth of

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[42] *See* Okla. Tax Comm'n v. Citizen Band Potawatomie Indian Tribe of Okla., 498 U.S. 505, 111 S. Ct. 905, 112 L. Ed.2d 1112 (1991) in which the United States Supreme Court held that the defendant tribe was not immune from the obligation to collect taxes on sales of cigarettes to nonmembers, but enjoyed immunity from suit by the state to enforce the obligation.

[43] Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 523 U.S. 751, 754, 118 S. Ct. 1700, 1702, 140 L. Ed.2d 981 (1998); Citizen Band Potawatomi Indian Tribe of Okla., *supra* note 42 at 509, 111 S. Ct. at 909; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677, 56 L. Ed.2d 106 (1978).

[44] Kiowa Tribe, *supra* note 43 at 760, 118 S. Ct. 1705; Native American Distributing v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1293 (10th Cir. 2008) (holding that sovereign immunity extended to a corporate enterprise of the tribe).

[45] Kiowa Tribe, *supra* note 43 at 760, 118 S. Ct. at 1705.

this immunity, several courts have held that it does not automatically extend to every business that happens to be tribally chartered or owned by individuals of Native-American ancestry. It has thus been held that an enterprise is clothed with a tribe's sovereign immunity from suit only if it operates as an extension of a tribe.[46] The question is "whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe."[47] In assessing the relationship of an enterprise to a tribe, incorporation under tribal law is one factor to be considered, but it is not the only factor. Also important

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[46] Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006) ("When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe."), *cert. denied*, 549 U.S. 1231, 127 S. Ct. 1307, 167 L. Ed.2d 119 (2007); Hagen v. Sisseton-Wahpeton Cmty. College, 205 F.3d 1040, 1043 (8th Cir. 2000); Ramey Constr. Co., Inc., v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315, 320 (10th Cir.1982) (holding that an inn which was "a sub-entity of the Tribe rather than a separate corporate entity" enjoyed tribal immunity); Trudgeon v. Fantasy Springs Casino, 71 Cal. App.4th 632, 642, 84 Cal. Rptr.2d 65 (1999) (recognizing sovereign immunity of for-profit corporation formed by a tribe to operate the tribe's casino); City of New York v. Golden Feather Smoke Shop, Inc., 2009 WL 705815 (E. D. N.Y. 2009); Parks v. Tulalip Resort Casino, 2010 WL 1727972 (W.D. Wash. 2010); Somerlott v. Cherokee Nation Distributors Inc., 2010 WL 1541574, *3 (W.D. Okla. 2010) (reviewing the authorities supporting the "arm of the tribe" inquiry and adopting it after finding broad support for its method of analysis). *See also* F. Cohen, *Handbook of Federal Indian Law*, §7.05(1)(a), at 636 (2005 ed.) stating, "Although immunity extends to entities that are arms of the tribes, it apparently does not cover tribally chartered corporations that are completely independent of the tribe.").

[47] Allen, *supra* note 46 at 1046.

are whether the business is managed by tribal officials, whether it is operated to further tribal governmental objectives, and whether the business's property is owned by the tribe.[48]

¶32 We find persuasive the reasoning of those authorities that would restrict tribal immunity from suit to tribal entities that operate as an arm of the tribe. Individual Native Americans acting for their own purposes are no more entitled to the immunity from suit afforded a tribe than a private state citizen engaging in his or her own business is entitled to the State's sovereign immunity. Tribal freedom from suit is an attribute of Indian sovereignty and may not and should not be extended to cover private entities operating for private gain based solely on the ethnicity of their owners.

¶33 Having so decided, we hold that Native Wholesale Supply is not clothed with tribal immunity from suit. Although Native Wholesale Supply is chartered by the Sac and Fox Nation, it does business on the tribal land of a different tribe; it is not managed by tribal officials of either tribe; and it is not operated to further the governmental objectives of any tribe. It operates solely as a private business for the personal profit of its owner who happens to be a Native American belonging to the Seneca Nation. The Company simply does not have a sufficiently close affiliation with any tribe to share in that tribe's sovereign immunity from suit.

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[48] *See e.g.*, Gristede's Foods, Inc. v. Unkechuage Nation, 660 F. Supp.2d 442, 477 (E. D. N.Y. 2009).

¶34 Just because Native Wholesale Supply is not entitled to tribal immunity from suit does not automatically mean that it is subject to the State's substantive law. Indian sovereignty rights are broader than just immunity from suit. In suits where Native-American tribes and individuals have initiated the litigation, thereby removing from consideration the question of tribal immunity from suit, a body of law has developed governing the conditions under which the principle of Indian Sovereignty bars the application of substantive state law to tribes and individual Indians.

¶35 The Indian Commerce Clause invests in Congress the power to "regulate Commerce . . . with the Indian tribes."[49] From these few words has emerged almost two centuries of United States Supreme Court jurisprudence aimed at reaching an acceptable accommodation between the claim of Native Americans to tribal sovereignty on their own land and the competing claim of the states that they have a right to assert their authority over all persons living within their borders. Not surprisingly, the contours of this accommodation have fluctuated over time in ways that reflect the changing relationship between Native Americans and the broader American society.

¶36 In the early nineteenth century, the notion of Indian communities as semi-independent nations led the Court to deny to the states the right to play any

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[49] U.S. Const. art. 1, §8.

role within a reservation's boundaries.[50] That bright line of separation has long since disappeared.[51] In *White Mountain Apache Tribe v. Bracker,*[52] the United States Supreme Court noted that there is no longer a rigid rule "by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members."[53] In *Bracker*, the Court synthesized various strands of its Indian law jurisprudence into a two-part test to determine which state laws may be enforced in Indian country without congressional consent.[54] This two-part test consists of two independent but related barriers to the assertion of state authority on Indian land: (a) preemption by federal law and (b) impermissible infringement on the right of reservation Indians to make their own laws and be ruled by them.[55]

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[50] Worcester v. Georgia, 31 U.S. 515, 6 Pet. 515, 8 L. Ed. 483 (1832).

[51] Williams v. Lee, 358 U.S. 217, 219, 79 S. Ct. 269, 270, 3 L. Ed.2d 251 (1959)("Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, . . .").

[52] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed.2d 665 (1980).

[53] *Id.* at 142, 100 S. Ct. at 2583.

[54] *Id.* (stating that the semi-independent status accorded Indian tribes together with the broad power of Congress to regulate tribal affairs under the Indian Commerce Clause has produced "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members").

[55] *Id.*

¶37 While either barrier standing alone may be "a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members,"[56] the two barriers are related in important ways. The tradition of tribal self-government requires the application to federal enactments regulating Indian tribes standards of preemption different from those used in other areas of law.[57] "The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been preempted by operation of federal law."[58] That tradition "is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development."[59] Preemption may therefore be found even in the absence of an express congressional statement of preemptive intent[60] and ambiguities in federal enactments must be construed in light of traditional notions of sovereignty and the federal policy of encouraging tribal independence.[61] At the same time, the applicable regulatory interest of the State must be taken into account to see if it outweighs

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[56] *Id.* at 143, 100 S. Ct. at 2583.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 143, 100 S. Ct. 2583-84.

[60] *Id.* at 144, 100 S. Ct. at 2584.

[61] *Id.* at 143-44, 100 S. Ct. at 2584.

the federal and tribal interests at stake.[62] In short, *Bracker* established a test that balances the federal, tribal, and state interests in determining when a state may exercise authority on tribal land.

¶38 The conflict between Indian sovereignty and state authority has most often been played out in the area of state taxation of tribes and tribal members. Applying the foregoing principles to *state taxation* of on-reservation conduct involving only Indians, the Court has held that, absent congressional consent, there is a "categorical bar" to state tax levies whose legal incidence falls directly upon tribes or tribal members for conduct that takes place wholly on tribal land.[63]

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[62] *Id.* at 144, 100 S. Ct. at 2584.

[63] *See, e.g.*, McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 165-66, 93 S. Ct. 1257, 1258-59,36 L. Ed.2d 129 (1973) (tax on income earned on reservation by tribal members residing on reservation invalid); Moe v. Confederated Salish and Kootenai Tries of the Flathead Reservation, 425 U.S. 463, 480, 96 S. Ct. 1634, 1645, 48 L. Ed.2d 96 (1976) (holding invalid (in the absence of congressional consent) property tax on personal property located within the reservation, vendor license fee as applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land, and cigarette sales tax as applied to on-reservation sales by Indians to Indian members of the governing tribe, but valid as to non-Indian purchasers); Bryan v. Itasca County, 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed.2d 710 (1976) (tax on Indian-owned personal property situated in Indian country invalid in absence of congressional consent); Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 115 S. Ct. 2214, 132 L. Ed.2d 400 (1995) (where legal incidence of motor fuel excise tax fell on Indian-owned retailers selling fuel on tribal trust land the tax was invalid in the absence of congressional consent).

> "[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and . . . such taxation is not permissible."[64]

This is so, the Court has explained, because the federal interest in encouraging tribal self-government in such cases is at its strongest and any state interest is correspondingly weak.[65]

¶39 Where *the legal incidence of a tax falls on a non-tribal entity* engaged in a transaction with a tribe or tribal members on the reservation, no categorical bar

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[64] Cabazon Band of Mission Indians, 480 U.S. 202, 216, n. 17, 107 S. Ct. 1083, 1092, n. 17, 94 L. Ed. 2d 244 (1987).

[65] *Id.* ("We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case."). Despite such statements in earlier cases, the Court has recently said that in the special area of state taxation of tribes and tribal members on tribal land, it has not applied the balancing test at all. *See* Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 110, 126 S. Ct. 676, 686, 163 L. Ed.2d 429 (2005) ("We have applied the balancing test articulated in Bracker only where 'the legal incidence of the tax fell on a nontribal entity engaged in a transaction with tribes or tribal members [citation omitted] on the reservation.").

operates to bar the tax,[66] but the Court has urged

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[66] *Decisions holding a tax on a non-Indian to be preempted:* Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685, 85 S. Ct. 1242, 14 L. Ed.2d 165 (1965) (Indian Trader Statutes preempted state tax on the gross receipts of a non-Indian federally licensed retailer who operated a store on an Indian reservation); Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160, 100 S. Ct. 2592, 65 L. Ed.2d 684 (1980) (Indian Trader Statutes preempt the field of retail transactions with Indians on Indian reservations so that non-federally licensed retailer residing off-reservation but conducting business with Indians on their reservation is immune from state's transaction privilege tax on on-reservation sale of tractor to tribal enterprise); Bracker, *supra* note 52 at 148-49, 100 S. Ct. 2586-87 (holding that motor carrier license and use fuel taxes imposed on a non-Indian-owned logging company's use of federally built, maintained, and policed roads located solely within an Indian reservation was invalid because Congress had enacted a comprehensive federal law regulating the harvesting of Indian timber and the State had not been able to identify any legitimate regulatory interest served by the taxes sought to be imposed).; Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 102 S. Ct. 3394, 73 L. Ed.2d 1174 (1982) (a comprehensive federal regulatory scheme for the education of reservation Indian children preempted a state tax on the gross receipts of a non-Indian contractor who constructed a school building for Indian children on their reservation). *Decisions holding state tax on non-Indian to be valid*: Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 109 S. Ct. 1698, 104 L. Ed.2d 209 (1989) (Mineral Leasing Act of 1938 did not preempt a state severance tax on non-Indian oil and gas producer whose operations were located on an Indian reservation and tax was valid where it imposed no economic burden on the tribe); Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, *supra* note 63 at 481-82, 96 S. Ct. 1645 (state may impose non-discriminatory sales tax on non-Indian customers of Indian retailers doing business on the reservation even if the tax seriously disadvantages the Indian retailer's business with non-Indians); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 161, 100 S. Ct. 2069, 2085, 65 L. Ed.2d

caution in inferring congressional permission to impose such a tax from the absence of an express Congressional statement of preemptive intent.[67] In this area of taxation, the *Bracker* interest balancing test requires a court to engage in "a particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . to determine whether. . . the exercise of state authority would violate federal law."[68] Applying the *Bracker* test, the Court has not only held it permissible to impose a state sales tax upon the on-reservation sales of goods by Indians to non-Indians,[69] but has also held that sales by members of a reservations's governing tribe to members of another tribe are amenable to state taxation.[70] This is so

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10 (1980) (state may impose a nondiscriminatory tax upon on-reservation sales to Indians who are not members of the reservation's governing tribe "for the simple reason that nonmembers are not constituents of the governing tribe" with a say in tribal affairs or a significant share in tribal disbursements)..

[67] Bracker, *supra* note 52 at 150-51, 100 S. Ct. at 2587.

[68] Bracker, *supra* note 52 at 145, 100 S. Ct. at 2584.

[69] Moe, *supra* note 63 at 481-82, 96 S. Ct. at 1645 (state may impose non-discriminatory sales tax on non-Indian customers of Indian retailers doing business on the reservation even if the tax seriously disadvantages the Indian retailer's business with non-Indians).

[70] Colville, *supra* note 66 at 161, 100 S. Ct. at 2085 (state may impose a nondiscriminatory tax upon on-reservation sales to Indians who are not members of the reservation's governing tribe "for the simple reason that nonmembers are not constituents of the governing tribe" with a say in tribal affairs or a significant share in tribal disbursements).

because when state interests outside the reservation are implicated, states may regulate the activities even of tribe members on tribal land.[71]

¶40 Also valid under the *Bracker* balancing test are regulations imposed on tribal wholesalers and retailers that are reasonably necessary to assess and collect a valid tax imposed on others. Thus, a tribal retailer can be required to pre-collect a valid state tax imposed on non-tribal members for sales made on the reservation,[72] and may also be required to keep records of exempt and non-exempt sales reasonably necessary to prevent fraudulent transactions.[73] Similarly, to assist in the collection of a sales tax validly imposed on sales to non-tribal members, a non-Indian wholesaler of cigarettes can be required to keep detailed records and comply with quantity limitations on the number of cigarettes it sells to a tribal retailer.[74] And a state may

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[71] Nevada v. Hicks, 533 U.S. 353, 362, 121 S. Ct. 2304, 2311, 150 L. Ed.2d 398 (2001).

[72] Moe, *supra* note 63 at 483, 96 S. Ct. at 1646 ("State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax.").

[73] Confederated Tribes of Colville Indian Reservation, *supra* note 66 at 160, 100 S. Ct. at 2084.

[74] Dept. of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 114 S. Ct. 2028, 129 L. Ed.2d 52 (1994) (Indian Trader Statutes did not preempt regulations imposed on federally licensed wholesalers who were required to keep detailed records and comply with limitations on the quantity of cigarettes they could sell to on-reservation retailers where the regulations were reasonably necessary to enforce the assessment and

seize a product en route to a reservation when the tribe refuses to fulfill its validly-imposed collection and remittance obligation.[75]

¶41 The *Bracker* interest balancing test is also brought to bear when a state seeks to apply a non-discriminatory, non-tax-related state law to an on-reservation activity. "Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border."[76] If the state's assertion of authority touches upon an on-reservation activity that is recognized by the federal government as a means for the tribe to achieve self-sufficiency and economic development[77] or if there is a historical tradition of

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collection of a valid state tax imposed on non-Indian and nonmember Indian purchasers of cigarettes from reservation retailers).

[75] Confederated Tribes of Colville Indian Reservation, *supra* note 66 at 161-62, 100 S. Ct. at 2085.

[76] Nevada v. Hicks, *supra* note 71 at 361, 121 S. Ct. at 2311 (holding that "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations" while the "State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government"). *Id.* at 364,121 S. Ct. at 2313.

[77] Cabazon Band of Mission Indians, *supra* note 65 at 216, 107 S. Ct. at 1092 ("The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian

Indian control of the activity,[78] the activity will be held to be preempted from state regulation unless the State is able to offer a justification for asserting its authority that outweighs the asserted federal or tribal interests.[79] Accordingly, the Court has held that a tribal liquor retailer could be required to obtain a state liquor license for the sale of alcohol for off-premises consumption because there was no historical tradition of tribal control of alcohol licensing and distribution and the state had a strong interest in regulating the activity.[80] But because there was a clear federal policy of promoting tribal gaming as a means of Indian

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self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.").

[78] Rice v. Rehner, 463 U.S. 713, 719-20, 103 S. Ct. 3291, 3296, 77 L. Ed.2d 961 (1983) ("When we determine that tradition has recognized a sovereign immunity in favor of the Indians in some respect, then we usually are reluctant to infer that Congress has authorized the assertion of state authority in that respect . . . . If, however, we do not find such a tradition, or if we determine that the balance of state, federal, and tribal interests so requires, our preemption analysis may accord less weight to the "backdrop" of tribal sovereignty.").

[79] Cabazon Band of Mission Indians, *supra* note 65 at 216, 107 S. Ct. 1092, *quoting* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334, 103 S. Ct. 2378, 2386, 76 L. Ed.2d 611 (1983) ("State jurisdiction is preempted ... if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.").

[80] Rice v. Rehner, *supra* note 78 at 725, 103 S. Ct. at 3299.

economic development, the state of California could not regulate tribally-operated bingo games.[81]

¶42 Finally, unless expressly prohibited by federal law, activities conducted by Native Americans off the reservation or the off-reservation activities of non-Indians or nonmember Indians doing business with reservation Indians are generally held to be subject to non-discriminatory state laws.[82] Resort to the *Bracker* interest balancing test in such a case is unnecessary.[83] Thus, hunting and fishing rights exercised by members of two Alaska Indian communities who had no reservation or other designated tribal land were subject to state conservation laws because state authority under those circumstances "does not impinge on treaty-protected reservation self-government."[84] A state tax can be levied on off-reservation activity by a tribe such as operating a ski resort off the

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[81] Cabazon Band of Mission Indians, *supra* note 65 at 221-22, 107 S. Ct. at 1094-1095.

[82] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 1270, 36 L. Ed.2d 114 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."); Bracker, *supra* note 52 at 144, n. 11, 100 S Ct. at 2584, n. 11.

[83] Wagnon v. Prairie Band Potawatomi Nation, *supra* note 65 at 112-13, 126 S. Ct. at 688, (rejecting the tribe's argument that an off-reservation tax imposed on the manufacture or sale of goods imported by the tribe or one of its members must be subjected to the interest balancing test)..

[84] Organized Village of Kake v. Egan, 369 U.S. 60, 75-76, 82 S. Ct. 562, 571, 7 L. Ed.2d 573 (1962); Puyallup Tribe v. Dept. of Game, 391 U.S. 392, 398, 88 S. Ct. 1725, 1728, 20 L. Ed.2d 689 (1968).

reservation.[85] A state may also tax income earned by a tribal member employed by the tribe on the reservation if the tribal member resides off the reservation, provided that no federal law or treaty prohibits it.[86] And a state motor fuel tax can be imposed on non-Indian distributors who sell fuel to on-reservation tribal fuel retailers where the tax is imposed on the distributors for receipt of the fuel off the reservation.[87]

¶43 Native Wholesale Supply argues that transactions between Native Americans - "tribal to tribal transactions" - are beyond the reach of state regulatory power.[88] While Native Wholesale Supply does not say

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[85] Mescalero Apache Tribe v. Jones, *supra* note 82 at 157-58, 93 S. Ct. at 1275.

[86] Okla. Tax Comm'n v. Chickasaw Nation, *supra* note 63 at 465, 115 S. Ct. at 2224 (rejecting Treaty of Dancing Rabbit Creek as preempting the tax). The Court declined to consider whether the tax might constitute an interference with tribal self-governance because the tribe failed to raise the issue either below or on certiorari. *Id.* at 465, n. 14, 115 S. Ct. at 2223.

[87] Wagnon, *supra* note 65 at 115, 126 S. Ct. at 689.

[88] Native Wholesale Supply characterizes its reliance on the Indian Commerce Clause as a challenge to the state court's subject matter jurisdiction. Because the inquiry under the Indian Commerce Clause is based on a type of federal preemption, that characterization may be inaccurate. Federal preemption is ordinarily an affirmative defense that may result in a lawsuit's dismissal for failure to state a claim. That decision is within the subject matter jurisdiction of a state court. *See e.g.*, BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc., 182 F.3d 851, 855 (11th Cir.1999) (". . . ordinary preemption operates to dismiss state claims on the merits and may be invoked in either

so expressly, it seems to be arguing that there is a dormant or negative aspect to the Indian Commerce Clause analogous to that found in the Interstate Commerce Clause. By granting to Congress the power to regulate Indian commerce, the Company implies, the Indian Commerce Clause forbids states to regulate such commerce. We see no support for such an interpretation of the Indian Commerce Clause in the jurisprudence of the United States Supreme Court, whose decisions clearly establish that the Indian Commerce Clause does not "of its own force" automatically bar all state regulation of Indian commerce.[89] Rather, each state assertion of authority over tribal land and tribal members must be examined in light of the Indian sovereignty principles developed by the Supreme Court for conformity to federal law.

¶44 Even accepting for the sake of argument that Native Wholesale Supply's transactions with Muscogee Creek Nation Wholesale take place on the Seneca Cattaraugus Indian Territory in New York because the business is located and accepts orders there, the Company's argument that enforcement of the Complementary Act against it violates the Indian Commerce Clause is clearly wrong. There is no blanket ban on state regulation of inter-tribal commerce even

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federal or state court."). *See also,* Reeds v. Walker,2006 OK 43, ¶14, 157 P.3d 100, 109 (distinguishing between the complete preemption doctrine of federal jurisdiction and the affirmative defense of ordinary preemption).

[89] *See e.g.* Confederated Tribes of the Colville Indian Reservation, *supra* note 66 at 154-62, 100 S. Ct. at 2069; Milhelm Attea & Bros., Inc., *supra* note 74 at 75, 114 S. Ct. at 2028; Ward v. New York, 291 F. Supp.2d 188, 199-200 (W. D. N.Y. 2003).

on a reservation. The Supreme Court has ruled precisely on that point by allowing state taxation of retail sales made on-reservation by tribal retailers to Native Americans who are not members of the governing tribe.[20] The transactions at issue in this case are between a Sac and Fox chartered corporation operating on the tribal land of another tribe with a third tribe, the Muscogee Creek Nation. Such transactions are not beyond the reach of state authority.

¶45 In reality, Native Wholesale Supply's transactions with Muscogee Creek Nation Wholesale extend beyond the boundaries of any single "reservation." The cigarettes at issue are manufactured in Canada, shipped into the United States, and stored in a Free Trade Zone in Nevada. Muscogee Creek Nation Wholesale places orders for cigarettes from its "reservation" located within the territorial boundaries of this State to Native Wholesale Supply at the latter's principal place of business on another "reservation" in another State. Delivery of the cigarettes to Muscogee Creek Nation Wholesale requires shipment of the cigarettes from Nevada to the purchaser's tribal land in Oklahoma. The entire process comprising these sales thus takes place in multiple locations both on and off different tribal lands. This is not on-reservation conduct for purposes of Indian Commerce Clause jurisprudence, but rather off-reservation conduct by members of different tribes. Therefore, Oklahoma's enforcement of the Complementary Act against Native Wholesale Supply passes muster without even evaluating it under the *Bracker* interest

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[20] Id.

balancing test. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."[91] The Complementary Act is a law of general application and there is no evidence that it is applied to Native-American cigarette wholesalers in a discriminatory manner.

¶46 Even if we were required to apply the *Bracker* interest balancing test for on-reservation activity by tribal members, the State's interest in enforcing the MSA through the Complementary Act would outweigh any interest the tribe or federal government might have in prohibiting its enforcement against Native Wholesale Supply. Neither the underlying MSA-imposed escrow obligation of the tobacco manufacturer nor the equitable relief sought against Native Wholesale Supply is a tax. The latter is a method adopted by the State to regulate the distribution and sale of tobacco products in the Oklahoma market. Native Wholesale Supply *has failed to cite any federal enactment* that expressly prevents the State of Oklahoma from regulating tobacco product distribution and sales in Oklahoma for the protection of the public treasury, defense of public health, and in the interest of maintaining the integrity of the Master Settlement Agreement.

¶47 Native Wholesale Supply relies instead on the general policy of the federal government to encourage economic development and self-sufficiency on the part

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[91] *See* Mescalero Apache Tribe v. Jones, *supra* note 82.

of Indian tribes and tribal members[92] and urges that because the Complementary Act interferes with its ability to engage in commerce with Muscogee Creek Nation Wholesale, the Act is preempted by federal law. We disagree. There is no federal jurisprudence pronouncing Indian sovereignty in the area of cigarette distribution and sales, nor have we been directed to any congressional enactments reflecting and encouraging tribal self-sufficiency and economic development through the distribution and sale of cigarettes.

¶48 The State of Oklahoma, on the other hand, has an exceedingly strong interest in enforcing compliance with the terms of the MSA. These interests have been set out by the legislature in the MSA and the Complementary Act. They include (a) shifting the costs of medical care for Oklahomans with smoking-related health care issues from the state to those in the business of manufacturing tobacco products and (b) preventing tobacco manufacturers who are not part of the MSA from gaining a cost advantage over their MSA-participating competitors.[93] The Complementary Act is a reasonably necessary, non-preempted means of carrying out these policies.

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[92] *See e.g.* Cabazon Band of Mission Indians, *supra* note 36 and Rice v. Rehner, *supra* note 78.

[93] *See* the provisions of 37 O.S. 2001 §600.21.

V
SUMMARY

¶49 Native Wholesale Supply, a tribally-chartered, Native-American owned corporation that distributes cigarettes to tribal entities in the United States seeks to avoid the strictures and incidence of state law regulating the distribution and sale of cigarettes. We hold that the State has personal jurisdiction over the defendant based on the Company's purposeful availment of the Oklahoma cigarette marketplace and has jurisdiction over the subject matter of this suit, the Native-American identity of the participants in the distribution channel notwithstanding.

¶50 **THE TRIAL COURT'S JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART AND THE CAUSE IS REMANDED FOR FURTHER PROCEEDINGS TO BE CONSISTENT WITH THIS OPINION.**

¶51 **EDMONDSON, C.J., TAYLOR, V.C.J., HARGRAVE, OPALA, WATT, WINCHESTER and COLBERT, JJ.,** concur

¶52 **KAUGER, J.,** concurs in the court's answer to the first question and concurs in result in the court's answer to the second question

¶53 **REIF, J.,** concurs in result

APPENDIX B

**IN THE DISTRICT COURT
OF OKLAHOMA COUNTY
STATE OF OKLAHOMA**

Case No. CJ-2008-4942

[Filed June 10, 2009]

STATE OF OKLAHOMA ex rel. W.A. "DREW" EDMONDSON, ATTORNEY GENERAL OF OKLAHOMA,	)
Plaintiff,	)
vs	)
NATIVE WHOLESALE SUPPLY, a Corporation chartered by the Sac and Fox Tribe of Oklahoma,	)
Defendant.	)

JOURNAL ENTRY OF JUDGMENT

Now on this 10th Day of April, 2009, this matter comes on for hearing on Defendant Native Wholesale Supply's Motion to Dismiss Plaintiff's Second Amended Petition bases upon lack of personal jurisdiction and lack of subject matter jurisdiction.

The Court having reviewed the pleadings, read the briefs filed by the parties and heard argument finds that the Defendant has sufficient contacts with the State of Oklahoma for the court to exercise personal jurisdiction over the Defendant. The Defendant's Motion to Dismiss based upon lack of personal jurisdiction should be and is hereby denied;

The Court having reviewed the pleadings, read the briefs filed by the parties and heard argument finds that the relief Plaintiff seeks, injunctive relief and disgorgement of the gross proceeds realized by Native Wholesale Supply for cigarette sales to the Muscogee Creek Nation for resale to Oklahoma consumers, in violation of the Oklahoma Tobacco Master Settlement Agreement Complementary Act, 68 O.S. § 360.1 et seq., is barred by the Indian Commerce Clause.

The Court further finds that Plaintiff's Amended Petition seeks relief that is barred by the Indian Commerce Clause ..hich cannot be cured by amendment. Therefore, this matter is dismissed with prejudice.

IT IS THEREFORE ORDERED AJUDGED AND DECREED that Native Wholesale Supply's Motion to Dismiss for lack of personal jurisdiction is hereby denied.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Native Wholesale Supply's Motion to Dismiss for lack of subject matter jurisdiction is hereby granted and this matter is dismissed with prejudice.

/s/
Bryan C. Dixon
District Judge

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APPENDIX C

**IN THE DISTRICT COURT OF
OKLAHOMA COUNTY
STATE OF OKLAHOMA**

Case No. CJ-2008-4942

[Filed May 29, 2008]

STATE OF OKLAHOMA, ex rel. W. A. "DREW" EDMONDSON, ATTORNEY GENERAL OF OKLAHOMA,	)
Plaintiff,	)
vs.	)
NATIVE WHOLESALE SUPPLY, a Corporation chartered by the Sac and Fox Tribe of Oklahoma,	)
Defendant.	)

PETITION

Comes now the State of Oklahoma, ex rel. W.A. "Drew" Edmondson, Attorney General of Oklahoma and alleges and states as follows:

JURISDICTION AND VENUE

1. This is a civil action seeking disgorgement and payment to the State of the gross proceeds realized by Native Wholesale Supply from cigarette sales made in violation of the Oklahoma Tobacco Master Settlement Agreement Complementary Act ("Complementary Act"), 68 O.S. § 360.1 et seq..

2. The Defendant, Native Wholesale Supply, is a closely held corporation chartered by the Sac and Fox Tribe of Oklahoma. On information and belief, Native Wholesale Supply has its principal place of business located on the Cattaraugus Indian Reservation in the State of New York.

3. This Court has jurisdiction over the Defendant, pursuant to the Complementary Act, because it has knowingly sold, transported or caused to be transported, and imported or caused to be imported, cigarettes for sale in Oklahoma, thereby transacting business within this state and availing itself of the privilege of conducting activities within the state.

4. Because the Defendant is a non-resident of the State of Oklahoma venue is proper in this Court pursuant to 12 O.S. §187.

INTRODUCTION

5. As used in this Petition the term "Case" of cigarettes generally describes a box which contains sixty (60) cartons of cigarettes; the term "Carton" of cigarettes describes a carton that contains ten (10) packages of cigarettes; the term "Package" of cigarettes describes a package which contains 20

individual cigarettes ("sticks"). Therefore, one case of cigarettes typically contains 12,000 individual cigarettes.

6. The State of Oklahoma Complementary Act, 68 O.S. § 3604(C)(1)-(2) requires that a tobacco product manufacturer and its brand families must be listed on the Directory of Compliant Tobacco Manufacturers maintained by the Oklahoma Attorney General before cigarettes can lawfully be sold in the state. Title 68 O.S. §360.7 (E) of the Complementary Act further provides:

> It shall be unlawful for a person to:
> a. sell or distribute cigarettes, or
> b. acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the state in violation of the Master Settlement Agreement Complementary Act.

7. Title 68 O.S. § 360.8 (G) of the Complementary Act provides that upon a finding that a person has violated the Tobacco Master Settlement Agreement Complementary Act, "the court shall order any profit, gain, gross proceeds, or other benefit from the violation to be forfeited and paid to the State Treasurer for deposit in the Tobacco Settlement Endowment Trust Fund."

8. Title 68 O.S. §360.8 (F) of the Complementary Act provides that in any action brought by the state to enforce the Master Settlement Agreement Complementary Act, the state shall be entitled to

recover its costs of investigation, expert witness fees, costs of the action, and reasonable attorneys fees.

VIOLATIONS BY DEFENDANT

9. "Seneca" cigarettes are a brand of cigarettes manufactured by Grand River Enterprises Six Nations, Ltd., a Canadian Limited Liability Corporation (hereinafter "GRE"). Since August 2006, GRE and its brand families have not been listed on the Oklahoma Attorney General's Directory and its products have not been approved for sale within the Sate of Oklahoma.

10. From or about February, 2007 through May, 2008, Native Wholesale Supply knowingly and unlawfully sold, distributed, acquired, held, owned, possessed, transported, imported, or caused to be imported for sale approximately 9,476 cases or 113,262,000 individual sticks of contraband Seneca brand cigarettes manufactured by GRE to Muscogee Creek Nation Wholesale located in the State of Oklahoma when it knew or should have known that those cigarettes were intended for distribution or sale in the state in violation of the Complementary Act. Native Wholesale Supply's gross receipts from its sales to Muscogee Creek Nation Wholesale was approximately $5,093,331.00.

REQUEST FOR RELIEF

Wherefore, Plaintiff requests (1) that the court find that Defendant violated the Oklahoma Master Settlement Agreement Complementary Act by its above alleged actions; (2) that the court enter an injunction preliminarily and permanently enjoining

the Defendant from violating the Complementary Act; (3) that the court order Defendant to account for all Seneca and other brands of cigarettes which it has sold, distributed, acquired, held, owned, possessed, transported, imported, or caused to be imported for sale in the State of Oklahoma from August 2006, to the present; (4) that judgment be entered against Defendant in the amount of any profit, gain, gross receipts or other benefit it received from all Seneca and other brands of cigarettes it sold within the State of Oklahoma since August 2006, in violation of the Master Settlement Agreement Complementary Act, estimated to be in excess of $5,093,331.00; and (5) that Plaintiff recover the cost of investigation, expert witness fees, costs, reasonable attorney fees, and such other and further relief to which Plaintiff may be entitled.

Respectfully submitted,

/s/ E. Clyde Kirk
E. Clyde Kirk OBA #10579
Ryan R. Chaffin, OBA #19430
ASSISTANT ATTORNEYS GENERAL
TOBACCO ENFORCEMENT UNIT
313 Northeast 21st Street
Oklahoma City, Okla. 73105
(405) 521-3921 Fax: (405) 522-4534
Clyde.Kirk@oag.ok.gov
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APPENDIX D

**IN THE DISTRICT COURT OF
OKLAHOMA COUNTY
STATE OF OKLAHOMA**

Case No. CJ-2008-4942

[Filed February 24, 2009]

STATE OF OKLAHOMA, ex rel. W.A. "DREW" EDMONDSON, ATTORNEY GENERAL OF OKLAHOMA,	)
Plaintiff,	)
vs.	)
NATIVE WHOLESALE SUPPLY, a Corporation chartered by the Sac and Fox Tribe of Oklahoma,	)
Defendant.	)

SECOND AMENDED PETITION

Comes now the State of Oklahoma, ex rel. W.A. "Drew" Edmondson, Attorney General of Oklahoma and alleges and states as follows:

I.

JURISDICTION AND VENUE

1. This is a civil action seeking disgorgement and payment to the State of the gross proceeds realized by Native Wholesale Supply from cigarette sales made in violation of the Oklahoma Tobacco Master Settlement Agreement Complementary Act ("Complementary Act"), 68 O.S. § 360.1 et seq..

2. The Defendant, Native Wholesale Supply ("NWS"), is a private corporation chartered by the Sac and Fox Tribe of Oklahoma and has a service agent located within the State of Oklahoma.

3. Arthur Montour, is the sole listed shareholder of NWS. Arthur Montour is not a member of the Sac and Fox Tribe of Oklahoma ("Sac and Fox"). NWS is not controlled by the Sac and Fox Tribe and it does not operate for the governmental purposes of the tribe. NWS operates for its own profit and financial gain. NWS has its principal place of business located on the Cattaraugus Indian Reservation in the State of New York.

4. This Court has subject matter jurisdiction over the Defendant, for violating state statutes pursuant to 20 O.S. §91.1, and in personam jurisdiction of the Defendant pursuant to 12 O.S. §2004 F. Defendant violated the Complementary Act because it has knowingly sold, transported, or caused to be transported, and imported or caused to be imported, cigarettes for sale in Oklahoma, thereby transacting business within this State and availing itself of the privilege of conducting activities within the State.

5. Because the Defendant is a non-resident of the State of Oklahoma venue is proper in this Court pursuant to 12 O.S. §187.

II.

REGULATORY BACKGROUND

6. The United States Supreme Court has ruled that states have the right to regulate cigarette sales between Indians and non-Indians, even those that occur on tribal land, so long as Congress has not forbidden it and the regulation does not infringe on tribal self government. There is no comprehensive federal tobacco law dealing with the regulation and sale of tobacco products; rather, federal policy leaves the licensing, sale, and distribution of tobacco products to the states under their traditional police powers where there is no tradition of tribal immunity. The State of Oklahoma imposes and collects cigarette excise tax upon the sale of cigarettes by smokeshops within the Indian Country of the Muscogee, pursuant to the authority of *Oklahoma Tax Comm. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991); *and Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). *In Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), the United States Supreme Court held that the States have a substantial interest in regulating Indian sales of cigarettes to non-tribal members occurring on Indian land that is sufficient to justify the assertion of State authority. State laws regulating Indian sales of cigarettes to non-tribal members do not frustrate tribal

self-government or "run afoul of any congressional enactment dealing with the affairs of reservation Indians." *Moe*, 425 U.S. at 483, 96 S.Ct. at 1646, 48 L.Ed.2d 96. Requiring ... tribal seiler[s] to collect taxes [is] a minimal burden justified by the State's interest in assuring the payment of these concededly lawful taxes. *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. at 513, 111 S.Ct. at 911, 112 L.Ed.2d 1112.

7. Despite ruling that State laws and regulations requiring Indian tribes to collect State taxes on cigarette sales to non-members are valid the United States Supreme Court has ruled that Indian Sovereign Immunity prohibits States from bringing direct actions against Indian tribes that fail to collect validly imposed taxes. See *Citizen Band Pottawatomie Tribe of Oklahoma*, 498 U.S. 509-11. Sovereign Immunity does not extend to individual Indians or to tribal officials acting beyond the scope of authority the tribe is authorized to bestow as a matter of federal or constitutional law. *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 171-72 (1977); and *Tenneco Oil Company v. Sac and Fox Tribe of Oklahoma*, 725 F2d 572, 574-75 (10th Cir. 1984).

8. The United States Supreme Court has offered several alternative remedies, a State may employ to require Indian Tribes to comply with valid state cigarette tax laws such as damage actions against individual agents or officers of a tribe citing *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.ED. 714 (1908). Collecting the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, *Colville, supra,* 447 U.S. at 161-62, 100 S.Ct. At 2085-86, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, *City*

Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n., 898 F.2d 122 (10th Cir. 1990). States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. See 25 U.S.C. § 476. *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. at 514, 111 S.Ct. At 912, 112 L.Ed.2d 1112.

9. In response to the Supreme Court's decision in *Citizen Band Potawatomi Indian Tribe of Okla.*, Oklahoma enacted a statutory regulatory scheme dealing with taxation of cigarettes sold by Indian Tribes. See 68 O.S. § 346 *et seq.* Under the regulatory scheme, Oklahoma authorized its Governor to enter into cigarette tax compact with Indian Tribes. Indian Tribes entering into cigarette tax compacts with the State of Oklahoma make a "payment in lieu of state ... excise taxes." See 68 O.S. § 346(C)(1). The amount of the "payment in lieu of state excise taxes" is in a negotiated amount that is less than the Oklahoma cigarette excise taxes imposed upon non-Indian sellers. The amount of the "payment in lieu of state excise taxes" is contained in the terms of the cigarette tax compacts. See 68 O.S. § 346(C)(1). The "payment in lieu of state excise taxes" is evidenced by the application of a tax stamp.

10. The Muscogee does not have an existing compact with the State. The Oklahoma regulatory scheme provides that a"tax in lieu of state excise tax" is imposed on all cigarette sales from non-compacting Indian Tribal stores. See 68 O.S. § 349(A). The "tax in lieu of state excise tax" is in the amount of seventy-five percent (75%) of the regular cigarette excise tax imposed on cigarette sales. See 68 O.S. § 349(A). The payment of the "tax in lieu of state excise taxes" is

evidenced by the application of a tax stamp. See 68 O.S. § 349(c); and 68 O.S. § 350(B). The rate of the "tax in lieu of state excise tax" is designed to allow non-compacting Indian Tribes to sell cigarettes to its members free from taxation. See 68 O.S. § 346(B). The rate of the "tax in lieu of state excise tax" assumes that twenty-five percent (25%) of a non-compacting Indian Tribe's cigarette sales will be to its members. See 68 O.S. § 346(B). However, if a non-compacting Indian Tribe can prove that more than twenty-five percent (25%) of its sales were to tribal members, it is entitled to a refund. The applicable cigarette excise tax rate is also set forth in the public record in the Oklahoma Administrative Code at OAC 710:70-7. Under Oklahoma law tribally owned or licensed stores may only purchase, receive, stock possess, sell or distribute stamped cigarettes obtained from wholesalers licensed by the State of Oklahoma. 68 O.S. § 427 provides that tobacco product wholesalers selling to non-compacting tribes within the state are responsible for collecting, reporting and remitting the tax on the tobacco product inventory sold to the tribally owned or licensed store.

11. Packs of cigarettes, held for sale and sold within the Indian Country of the Muscogee, which do not bear evidence of the tax stamp required by 68 O.S. §349, and OAC 710:70-7-8 are unstamped, pursuant to 68 O.S. §348.6. Packs of cigarettes, held for sale and sold within the Indian Country of the Muscogee, which are "unstamped", pursuant to 68 O.S. §348.6., are "contraband cigarettes" pursuant to 68 O.S. §348.7.

12. The Federal Contraband Cigarette Trafficking Act makes it "unlawful for any person to knowingly to ship, transport, receive, possess, sell distribute, or purchase contraband cigarettes." 18 U.S.C. §2342.

Under the statute the term "contraband cigarettes" means a "quantity in excess of 10,000 cigarettes which bear no evidence of the payment of the applicable State cigarette taxes in the State where the cigarettes are found. . ." 18 U.S.C. § 2341. The Contraband Cigarette Trafficking Act is a federal statute of general applicability that applies equally to Indians, and Indian tribal organizations, even on Indian land, as it does to others. *United States v. Baker*, 63 F.3d 1478 (9th Cir. 1995), cert denied, 516 U.S. 1097 (1996). Under the Contraband Cigarette Trafficking Act the Muscogee are legally obligated, and have a non-discretionary duty to comply with the State's cigarette tax scheme.

13. On November 23, 1998, leading United States tobacco product manufacturers entered into a settlement agreement, entitled the "Master Settlement Agreement," with the State of Oklahoma. The Master Settlement Agreement obligates these manufacturers to pay substantial sums to the State (tied in large part to their volume of sales); to fund a national foundation devoted to the pursuit of public health interests; and to make substantial changes in their advertising and marketing practices and corporate culture with the intention of reducing underage smoking.

14. Shortly after the Master Settlement Agreement was signed, the Oklahoma Legislature passed the "Oklahoma Prevention of Youth Access to Tobacco Act" (the Act). In essence, the Act requires "tobacco product manufacturers" to either: (1) "[b]ecome a participating manufacturer (as that tern is defined in Section II(jj) of the Master Settlement Agreement) and generally perform its financial obligations under the Master Settlement Agreement," or (2) place into a

qualified escrow fund the amounts required by the Act, codified at Title 37 O.S. §§ 600.21 et seq. Under this statute tobacco product manufacturers who have not joined the MSA must establish a reserve fund "...to guarantee a source of compensation and to prevent such manufacturers from deriving large, short term profits and then becoming judgment proof before liability may arise." The funds are placed into escrow are in proportion to the number of cigarettes the manufacturer sells in the state. The manufacturer receives interest on these funds and at the end of twenty-five years any funds not used to pay a judgment are returned to the manufacturer. Unlike cigarette excise tax statutes, the burden of funding an escrow account is upon the manufacturer, not wholesalers, retailers, or consumers.

15. In 2004, the Oklahoma Legislature decided that violations of the Act threaten the integrity of Oklahoma's Master Settlement Agreement, the fiscal soundness of the state and public health and enacted procedural enhancements to help prevent violations of the Act by adopting the Oklahoma Tobacco Master Settlement Agreement Complementary Act (the Complementary Act), codified at Title 68 O.S. §360.1, et seq. The Complementary Act requires tobacco manufacturers to submit an annual certification to the Oklahoma Tax Commission and Attorney General demonstrating that it is either a PM or is a 'Non-Participating Manufacturer" ("NPM") in full compliance with the "Oklahoma Prevention of Youth Access to Tobacco Act." See 68 O.S. § 360.4; See also 37 O.S. § 600.23(E). The certification is due April 30th of each year. See 68 O.S. § 360.4(A). Part of the certification process requires NPMs to list the number of cigarettes sold in the preceding calender year, to

certify that they have "established and continue to maintain a qualified escrow fund" in compliance with the "Escrow Statute" of the "Oklahoma Prevention of Youth Access to Tobacco Act," to include with such certification the amount the NPM has placed in the escrow account and to submit "any evidence or verification as may be deemed necessary by the Attorney General to confirm" the escrow information provided by the NPM. 68 O.S. § 360.4(A)(3); 68 O.S. § 360.4 (A)(4)(b-c); 68 O.S. § 360.4(5); 68 O.S. § 360.6(c).

16. The Attorney General uses the information obtained through the certification process to publish a directory on its website listing all of the tobacco manufacturers that are in compliance with the requirements of the "Oklahoma Prevention of Youth Access to Tobacco Act" and the "Master Settlement Agreement Complementary Act." See 68 O.S. § 360.4(B). Tobacco manufacturers that have not met the certification requirements and NPMs that have not complied with the "Escrow Statute" are not listed on the directory and their products may not be sold in the state. See 68 O.S. § 360.4(B); and 68 O.S. § 360.8(A).

17. Title 68 O.S. §360.7 (E) of the Complementary Act makes it unlawful, inter alia, for any person to acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are of a tobacco product manufacturer or brand family not included in Oklahoma's Directory of Compliant Tobacco Product Manufacturers and Brand Families (Directory). The identity of all tobacco products and manufacturers who are compliant with the MSA and the Complementary Act ("MSA-compliant") is a public record, displayed on the website

of the Oklahoma Attorney General. Cigarettes of a tobacco product manufacturer or brand family not listed in the directory (hereafter, "non-MSA compliant") are also matters of law, which the Defendants, and each of them, are deemed to know.

III.

FACTUAL ALLEGATIONS

18. Until April 10, 2007, Native Wholesale Supply stored cigarettes at a warehouse owned by UPS Supply Chain Solutions, located in Catoosa, Oklahoma. Eric Johnson, Warehouse Manager, under authority of a Power of Attorney from NWS, acted as its agent in fact in Oklahoma. On April 10, 2007, Native Wholesale Supply, acting through its agent in fact, abandoned and forfeited 568 cases or 34,080 individual cartons of cigarettes which it had stored at UPS Supply Chain Solutions Warehouse located in Catoosa, Oklahoma. On May 31, 2007, those cigarettes were transported to and buried at a landfill, regulated by the State of Oklahoma, located in Tulsa, Oklahoma.

19. On February 22, 2008, the Oklahoma Tax Commission seized 189 full cases and 19 half cases, or 11,910 cartons of contraband cigarettes that Native Wholesale Supply knowingly and unlawfully sold, distributed, acquired, held, owned, possessed, transported, imported, or caused to be imported for sale to Bowen Wholesale, located in the State of Oklahoma. The cigarettes were forfeited and subsequently destroyed.

20. On February 29, 2008, the State of Oklahoma seized a number of cases of Seneca Brand Cigarettes

from Norman Edward Enyart, Jr., an individual operating an internet pharmacy and smokeshop off of Indian land. Thirty Thousand Four Hundred Thirty-Nine (30,439) packs of contraband cigarettes, a large number of which were Seneca brand, were forfeited and destroyed in Delaware County, Oklahoma.

21. Records from Bowen Wholesale showed the contraband tobacco products it possessed had been shipped by carrier from the Nevada International Trade Corporation, a Foreign Trade Zone ("FTZ") located in Las Vegas, Nevada. Records subpoenaed from the carrier and the Nevada FTZ revealed that from or about February, 2007, through October, 2008, Native Wholesale Supply had also knowingly and unlawfully sold, distributed, acquired, held, owned, possessed, transported, imported, or caused to be imported for sale approximately 15,270 cases or 916,200 cartons of contraband Seneca Brand cigarettes manufactured by GRE to Muscogee Creek Nation Wholesale located in the State of Oklahoma.

22. NWS had the cigarettes shipped from the manufacturer, Grand River Enterprises, in Canada, to the Las Vegas FTZ. NWS, acting through a local Customs Broker in Las Vegas, then had the cigarettes released from the FTZ, and shipped to recipients in Oklahoma. NWS arranged with a common carrier for shipment of its product into Oklahoma, directed the carrier where to pick up and deliver the product, and paid the shipping costs to have its product delivered into Oklahoma. At no time was the FTZ or carrier contacted by the recipient to arrange shipping.

23. On October 15, 2008, the Oklahoma Tax Commission seized an additional 1,267 cartons of

Seneca brand cigarettes from two cigarette retailers, located off of Indian land, which had been purchased from Creek Nation Wholesale. Window displays in these retailers, located off of Indian land, in Oklahoma reveal that Native Wholesale Supply is marketing its Seneca brand cigarettes to consumers in Oklahoma through cash and merchandise giveaways which require product purchase.

24. Arthur Montour, President of Native Wholesale Supply, and Kim Porter, National Sales Manager of Native Wholesale Supply, have personally traveled to Oklahoma to market their product to cigarette retailers doing business within the State of Oklahoma.

25. Records from the United States Census Bureau show a population of 2124 individuals, ages 18 and above, in Okmulgee County who reported their heritage as Creek alone or any combination. A study by the Oklahoma Department of Health revealed the prevalence of cigarette smoking in the adult population of Native Americans in Oklahoma is 33% as compared to the general adult population rate of 23%. Native Americans in Oklahoma reported smoking, on average, about a half pack of cigarettes per day. Instead of an expected consumption of 11/2 cartons of cigarettes per month, smokers of Creek heritage in Okmulgee County would have to exclusively smoke Seneca brand cigarettes at a rate of 98 and ½ cartons of cigarettes per month to consume the average of 1149 cases of Seneca brand cigarettes shipped to Okmulgee County by NWS each month.

26. In December, 2008, investigators from the Oklahoma Attorney General's Office purchased Seneca and two other brands of contraband non-escrowed,

non-taxed cigarettes from smokeshops owned or licensed by the Muscogee Creek tribe of Oklahoma. No proof of tribal membership was required for the purchases. Statistically 98.5% of the sales of Seneca brand cigarettes by Muskogee Creek retailers in Okmulgee County are to non-tribal members.

27. Oklahoma has had no reservations for more than 100 years. *Osage Nation v. State of Oklahoma ex rel Oklahoma Tax Commission*, __ F.Supp.2d __, 2009 WL204194 (N.D. Okla.). Indians residing in Oklahoma are citizens of the state and are amenable to its civil and criminal laws. *United States v. Hester*, 137 F.2d 145, 147 (10th Cir. 1943).

28. Title 68 O.S. §360.8 (G) of the Complementary Act provides that upon a finding that a person has violated the Tobacco Master Settlement Agreement Complementary Act, "the court shall order any profit, gain, gross proceeds, or other benefit from the violation to be forfeited and paid to the State Treasurer for deposit in the Tobacco Settlement Endowment Trust Fund."

29. Title 68 O.S. §360.8 (F) of the Complementary Act provides that in any action brought by the state to enforce the Master Settlement Agreement Complementary Act, the state shall be entitled to recover its costs of investigation, expert witness fees, costs of the action, and reasonable attorneys fees.

VIOLATIONS BY DEFENDANT

30. "Seneca" cigarettes are a brand of cigarettes manufactured by Grand River Enterprises Six Nations, Ltd., a Canadian Limited Liability

Corporation (hereinafter "GRE"). Since August 2006, GRE and its brand families have not been listed on the Oklahoma Attorney General's Directory and its products have not been approved for sale within the State of Oklahoma.

31. From or about February, 2007 through October, 2008 and continuing, Native Wholesale Supply knowingly and unlawfully sold, distributed, acquired, held, owned, possessed, transported, imported, or caused to be imported for sale in excess of 15,270 cases, or 916,200 cartons of contraband Seneca brand cigarettes manufactured by GRE to Muscogee Creek Nation Wholesale for resale to consumers in the State of Oklahoma when it knew, or should have known, that those cigarettes were intended for distribution or sale in the state in violation of the Complementary Act. Native Wholesale Supply's gross receipts from its sales to Muscogee Creek Nation Wholesale alone is $8,245,800.00.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests (1) that the court find that Defendant violated the Oklahoma Master Settlement Agreement Complementary Act by its above alleged actions; (2) that the court enter an injunction preliminarily and permanently enjoining the Defendant from violating the Complementary Act; (3) that the court order Defendant to account for all Seneca and other brands of cigarettes which it has sold, distributed, acquired, held, owned, possessed, transported, imported, or caused to be imported for sale in the State of Oklahoma from August 2006, to the present; (4) that judgment be entered against Defendant in the amount of any profit, gain, gross

receipts, or other benefit it received from all Seneca and other brands of cigarettes it sold within the State of Oklahoma since August 2006, in violation of the Master Settlement Agreement Complementary Act, estimated to be in excess of $8,245,800.00; and (5) that Plaintiff recover the cost of investigation, expert witness fees, costs, reasonable attorney fees, and such other and further relief to which Plaintiff may be entitled.

Respectfully submitted,

/s/ E. Clyde Kirk
E. Clyde Kirk OBA #10572
Ryan R. Chaffin, OBA #19430
ASSISTANT ATTORNEYS GENERAL
TOBACCO ENFORCEMENT UNIT
313 Northeast 21st Street
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Clyde.Kirk@oag.ok.gov
Ryan.Chaffin@oag.ok.gov

[Certificate of Service omitted in printing]

APPENDIX E

**IN THE DISTRICT COURT OF
OKLAHOMA COUNTY
STATE OF OKLAHOMA**

Case No. CJ-2008-4942

[Filed March 11, 2009]

STATE OF OKLAHOMA, ex rel. W.A. "DREW" EDMONDSON, ATTORNEY GENERAL OF OKLAHOMA,	)
Plaintiff,	)
vs.	)
NATIVE WHOLESALE SUPPLY, a Corporation chartered by the Sac and Fox Tribe of Oklahoma,	)
Defendant.	)

DEFENDANT NATIVE WHOLESALE SUPPLY'S MOTION TO DISMISS SECOND AMENDED PETITION AND BRIEF IN SUPPORT

* * *

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No.: 08-CV-818D

STATE OF OKLAHOMA, ex rel. W.A. "DREW" EDMONDSON, ATTORNEY GENERAL OF OKLAHOMA,	)
Plaintiff,	)
vs.	)
NATIVE WHOLESALE SUPPLY, a Corporation charted by the Sac and Fox Tribe of Oklahoma,	)
Defendant.	)

AFFIDAVIT OF ARTHUR MONTOUR IN SUPPORT OF DEFENDANT NATIVE WHOLESALE SUPPLY'S MOTION TO DISMISS PLAINTIFF'S PETITION

STATE OF NEW YORK)
: ss.:
COUNTY OF CATTARAUGUS)

ARTHUR MONTOUR, being duly sworn, deposes and says:

1. I am the President and sole owner of Defendant, Native Wholesale Supply ("NWS"). I am a Native American and a member of the Seneca Nation. I am fully familiar with the facts set forth herein, and I submit this affidavit in support of NWS's motion to dismiss the Petition of Plaintiff, State of Oklahoma, ex rel. W.A. "Drew" Edmondson, Attorney General of Oklahoma.

2. In or around 2001, NWS was chartered as a corporation by the Sac and Fox Tribe of Oklahoma. I have been the President and sole owner of NWS since it was chartered. NWS's office has always been located on the Seneca Cattaraugus Indian Territory in Gowanda, New York. NWS has no other office.

3. The primary business of NWS is the of tobacco products. NWS imports cigarettes manufactured by Grand River Enterprises ("Grand River") for resale to third parties. Grand River is wholly owned by Native Americans who are members of the Six Nations of the Grand River. Grand River is a Canadian corporation that produces, packages and sells tobacco products. Grand River's facility is located on the Grand River Reserve in Oshweken, Canada.

4. NWS purchases and imports cigarettes from Grand River, and then stores the cigarettes (after they pass through customs) at one of three facilities: (a) the Western New York Foreign Trade Zone in Lackawanna, New York; (b) the Southern Nevada Foreign Trade Zone in Las Vegas, Nevada; and (c) a bonded warehouse on the Seneca Cattaraugus Indian Territory. NWS does not own any of these facilities, but merely rents space from them.

5. NWS resells the cigarettes to entities in the United States that are located on tribal land and owned by Native Americans. All orders are placed and processed at NWS's office on the Seneca Cattaraugus Indian Territory. All checks or other forms of payment are remitted or forwarded to NWS's office. All cigarettes sold by NWS are in packages that are stamped "for reservation sales only."

6. All cigarettes sold by NWS are (and have always been) sold at all times on an F.O.B. Seneca Nation basis, with title and risk of loss transferring to the purchaser at the time of sale on the Seneca Cattaraugus Indian Territory. Once a transaction is completed, products are shipped from one of the three aforementioned facilities. NWS does not exercise any control over its products subsequent to their sale to third parties. NWS does not sell or import any cigarettes into the State of Oklahoma. Any transport of products to Oklahoma occurs solely as a result of a third party's conduct or direction.

7. As stated above, NWS is a corporation charted by the Sac and Fox Tribe, with its place of business on the Seneca Cattaraugus Indian Territory in New York. NWS has no presence in Oklahoma, and does not do or transact business in Oklahoma. Specifically, NWS does not sell products within the jurisdiction of the State of Oklahoma, nor has it ever contracted to do so; NWS does not maintain any place of business in Oklahoma; NWS has no personnel, office, real estate, sales agents, mailing address or bank account in Oklahoma; NWS does not advertise or solicit business in Oklahoma; NWS does not have a telephone number or listing in Oklahoma; and NWS does not own or have registered an automobile in Oklahoma

/s/ Arthur Montour
ARTHUR MONTOUR

Sworn to before me this
21st day of August, 2008

/s/ Terry L. Thompson
NOTARY PUBLIC

TERRY L. THOMPSON
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01TH6126516
QUALIFIED IN ERIE COUNTY
MY COMMISSION EXPIRES MAY 2, 2009

EXHIBIT B

OFFICE OF THE SECRETARY OF STATE

STATE OF OKLAHOMA

CERTIFICATE NO RECORD

I THE UNDERSIGNED, *Secretary of State of the State of Oklahoma, do hereby certify that I am, by the laws of said State, the custodian of the records of the state of Oklahoma relating to the right of certain business entities to transact business in this state and am the proper officer to execute this certificate.*

I FURTHER CERTIFY *that at 11:25 a diligent search was made of the records of this office for NATIVE WHOLESALE SUPPLY and that no record of such business entity name exists as a domestic corporation, a foreign corporation qualified to transact business in Oklahoma, a partnership fictitious name, a trade name, a domestic limited liability company, a foreign limited liability company qualified to transact business in Oklahoma, a domestic limited partnership or a foreign limited partnership qualified to transact business in Oklahoma to the date and time of this certificate.*

IN TESTIMONY WHEREOF, *I hereunto set my hand and affixed the Great Seal of the State of Oklahoma, done at the City of Oklahoma City, this 9th, day of March, 2009.*

/s/

Secretary Of State

APPENDIX F

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

September 27, 2010

Mr. Marc Edwards
Phillips Murrah P.C.
Thirteenth Floor, Corporate Tower
101 N. Robinson
Oklahoma City, OK 73102

Re: Native Wholesale Supply
v. Oklahoma, ex rel. W. A. Drew Edmondson, Attorney General of Oklahoma
Application No. 10A318

Dear Mr. Edwards:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Sotomayor, who on September 27, 2010 extended the time to and including December 3, 2010.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. **Suter,** Clerk

by /s/ Jeffrey Atkins

Jeffrey Atkins
Supervisor-Case Analyst Division

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No. 10-754

Supreme Court, U.S.
FILED
MAR 21 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

NATIVE WHOLESALE SUPPLY,
a Corporation Chartered by the
Sac and Fox Tribe of Oklahoma,

Petitioner,

v.

STATE OF OKLAHOMA,
ex rel., W.A. "DREW" EDMONDSON,
ATTORNEY GENERAL OF OKLAHOMA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

BRIEF IN OPPOSITION

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RESPONDENT STATE OF OKLAHOMA'S COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Oklahoma Supreme Court erred in finding the State's Second Amended Petition asserted sufficient jurisdictional facts to meet either a "purposeful direction" or the more restrictive "purposeful availment" standard for personal jurisdiction.

2. When a member of the Seneca Nation of New York forms a private, for profit corporation under the laws of a separate Indian Tribe, the Sac and Fox Tribe of Oklahoma, and the corporation operates its business from the Seneca Reservation in New York, imports cigarettes from a Canadian cigarette manufacturer, stores the cigarettes on non-Indian lands in Nevada, and then sells and arranges for the delivery of those cigarettes to a third Indian Tribe, the Muscogee Creek Nation of Oklahoma, for resale to non-tribal member consumers in Oklahoma, does the Indian Commerce Clause bar State taxation and regulation of those sales, under a "Nation to Nation" Intertribal Commerce theory?

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STATEMENT OF THE CASE

Plaintiff State of Oklahoma, ex rel., W.A. "Drew" Edmondson, filed this civil action in the District Court of Oklahoma County, State of Oklahoma against Native Wholesale Supply ("NWS") seeking injunctive relief and disgorgement and payment to the State of the gross proceeds realized by NWS from cigarette sales made in violation of the Oklahoma Tobacco Master Settlement Agreement Complementary Act, 68 O.S. §§360.1, *et seq*.

NWS filed a Motion to Dismiss for lack of personal jurisdiction and subject matter jurisdiction. The court denied NWS' challenge to personal jurisdiction but granted its challenge to subject matter jurisdiction under the Indian Commerce Clause. The State of Oklahoma was granted leave to amend its Petition. The State filed an Amended Petition and shortly thereafter a Second Amended Petition asserting additional factual allegations. The District Court, without conducting an evidentiary hearing, found the State in its Second Amended Petition had made a prima facie showing of personal jurisdiction and denied defendant's Motion to Dismiss for lack of personal jurisdiction. The Court, however, granted defendant's Motion to Dismiss for lack of subject matter jurisdiction under the Indian Commerce Clause.

The State of Oklahoma appealed the trial court's Order dismissing this case for lack of subject matter jurisdiction under the Indian Commerce Clause. NWS filed a Counter-Petition in Error asserting that

the trial court erred in denying its Motion to Dismiss for lack of personal jurisdiction.

The Oklahoma Supreme Court sustained the District Court's finding that it had personal jurisdiction over NWS and reversed the District Court determination that the Indian Commerce Clause barred the State's cause of action.

SUMMARY OF THE ARGUMENT

Neither of the Questions Presented by NWS merits this Court's plenary review under the standards of Sup.Ct. R. 10. The first Question Presented is based on a false premise – that the Supreme Court of Oklahoma adopted a "'purposeful *direction*' specific jurisdiction standard" rather than a "purposeful *availment*" standard, thereby supposedly creating a conflict with decisions of this Court and the federal Courts of Appeals. *See* NWS Petition for Writ of Certiorari ("Pet.") at 10-11 (emphasis added). The court below did no such thing. To the contrary, it emphasized that it did not need to choose between these standards "because Native Wholesale Supply has engaged in conduct that satisfies even the rigorous criteria advocated by Justice O'Connor" in her plurality opinion in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987) – namely, the "purposeful availment" standard. *See* Pet. App. at 14a.

The Oklahoma Court's application of the purposeful availment standard to the facts of this case is

manifestly correct, and certainly presents no cert-worthy issue. Contrary to NWS' claim that the contracts in issue here were "entered into . . . and fully performed *outside*" Oklahoma (Pet. at I, emphasis added), the record evidence overwhelmingly demonstrates that NWS has (1) directly and repeatedly solicited business from tribes in Oklahoma, including personal sales trips to the State by both its President and National Sales Manager; (2) created an elaborate distribution system for delivering cigarettes into Oklahoma; and (3) arranged to channel *hundreds of millions* of contraband cigarettes into the State. As emphasized by the court below, "[t]o claim, as Native Wholesale Supply does, that it does not know, expect, or intend that the cigarettes it sells to [Oklahoma tribal wholesalers] are intended for distribution and resale in Oklahoma is simply disingenuous." Pet. App. at 18a; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) ("parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities"). As demonstrated below, many of NWS' denials of jurisdictional contacts with Oklahoma are not only "disingenuous," but downright false and misleading.[1]

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[1] This Court should be aware that NWS recently pled guilty to federal obstruction-of-justice charges that grew out of very similar misrepresentations it made to a federal court about its supposed lack of jurisdictional contacts with the State of

(Continued on following page)

The second Question Presented fares no better. It rests entirely on the false premise that a tribe and its members located in one State have a protected right under federal Indian law to purchase and bring into the State goods from *other* Indian tribes in *other* States, free of any state taxation or regulation.[2] *See* Pet. at 10 (claiming immunity for "purely Indian commerce"), 25-34. This Court has repeatedly rejected such claims to "intertribal immunity" from state taxation and regulation. *See, e.g., Duro v. Reina,* 495 U.S. 676, 686-87 (1990); *Rice v. Rehner*, 463 U.S. 713, 720

Washington. Many of the false statements that NWS and its President, Mr. Montour, made in the Washington litigation are virtually *identical* to several of the key jurisdictional denials that NWS and Montour have made in the present litigation. *See United States v. Montour*, No. CR 0900214MJP, 2010 WL 3211888, at **1, 3-4 (W.D. Wash. Aug. 12, 2010) (detailing the "false statements to the Court" that formed the basis for the obstruction-of-justice count). The penalties imposed on NWS for making these false jurisdictional statements included forfeitures totaling $1 million, 5 years probation, additional "criminal monetary penalties," and stringent injunctive relief. *See* Sept. 10, 2010 Judgment in a Criminal Case in *United States v. Montour*.

[2] Although NWS is owned by a member of the Seneca Nation of New York and located on that Reservation, it is chartered by the Sac and Fox Tribe of Oklahoma. The Sac and Fox Tribe of Oklahoma entered into a Tobacco Compact with the State of Oklahoma. Under that Compact all tobacco sales, including tribal member sales, are subject to a reduced State excise tax. The Compact further provides that all tobacco products sold by tribal retailers must be from MSA compliant manufacturers who must fund an Escrow Account for those Sales. *See* Oklahoma Secretary of State, Executive Legislation Division, File No. 39638, filed on March 26, 2004. NWS has complied with none of these requirements.

& n. 7 (1983); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160-61 (1980).

There is no reason to depart from this clear precedent here. There is no split among lower courts on this point. Indeed, as one Oklahoma federal court recently emphasized in rejecting this identical claim, "the Supreme Court has repeatedly held that Native American immunities from state taxation and regulation only extend to commerce *within* a particular tribe, not to commerce *among* different tribes or their members," and a contrary rule "would truly be unprecedented." *Muscogee (Creek) Nation v. Henry*, Civ. No. 10-019-JHP 2010 WL 1078438, at **3-4 (E.D. Ok. Mar. 18, 2010).

STANDARD OF REVIEW ON MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION WHERE NO EVIDENTIARY HEARING IS HELD

A court may address a motion to dismiss for lack of *in personam* jurisdiction prior to trial based solely on documentary evidence or by holding a hearing. If the court decides the motion only on the documentary evidence, the plaintiff need only demonstrate a prima facie showing of personal jurisdiction to defeat the motion. Allegations of the complaint must be accepted as true to the extent that they are not contradicted by the defendant's competent evidence. If the parties

submit conflicting evidence, all factual disputes are resolved in the Plaintiff's favor. *See Powers v. District Court*, 227 P.3d 1060, 1066-67 (Okl. 2009).

COUNTER-STATEMENT OF FACTS

The affidavit that NWS submitted to the District Court in support of its motion to dismiss for lack of personal jurisdiction was controverted by extensive documentary evidence submitted to the court by the State. Specifically, the State submitted the following documents:

1. The State submitted documents demonstrating NWS was storing its cigarettes in Oklahoma including a document titled "Notice Of Abandonment and Assent to Forfeiture of Prohibited or Seized Merchandise and Certificate of Destruction" of 568 cases of cigarettes, dated April 10, 2007, which NWS had stored at a warehouse in Catoosa, Oklahoma. This notice was signed by NWS' designated agent in fact in Oklahoma, Eric Johnson.

2. A Certificate of Disposal, dated May 31, 2007, by Waste Management of Oklahoma, Inc., affirming that the 568 cases of abandoned or forfeited cigarettes were buried in a land field located in Tulsa, Oklahoma.

3. A UCC Financing Statement dated June 28, 2006 given by NWS to Upstate Bank in Rochester, New York pledging collateral located at UPS Supply

Chain Solutions, 5445 N. Bird Creek Avenue, Catoosa, Oklahoma 74015, and other locations.

4. Exemplar Bills of Lading, Invoices, Warehouse Withdrawal Forms and cancelled checks revealing that NWS created a distribution center for its cigarettes located off of Indian land in Las Vegas, Nevada. This evidence demonstrated that NWS arranged, paid for and directed the shipping of its cigarettes to MCN Tobacco Wholesale located in Okmulgee, Oklahoma.

5. NWS is the importer and trademark holder for Seneca brand cigarettes.[3] An affidavit from Clint Long, of the Oklahoma Tax Commission, documented the seizure of more than 10,000 packs of Seneca brand cigarettes from smoke shops located off of Indian land. The affidavit also described the Seneca cigarette marketing campaign as displayed in one of the smokeshop's windows. Photographs of the campaign were attached to his affidavit. The photographs reveal that on May 2, 2008, NWS awarded prizes to a winning store, customer and cashier in Oklahoma. These prizes included a Plasma television, and $5,000.00 in cash. In a second contest from October 6, 2008, to December 8, 2008, NWS awarded a first prize of $10,000.00, a second prize of $5,000.00, and a

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[3] *See* NAFTA AWARD, http//www.state.gov/documents/organization/156820.pdf, and *Native Wholesale Supply, et al. v. Campbell Wholesale*, Case No. 03-CV-065, U.S. District Court, Northern District of Oklahoma (March 10, 2003).

third prize of $2,500.00, in Oklahoma as noted by the photographs attached to the affidavit.[4]

6. The Agenda for a "Tobacco Forum" held on November 12, 2008, at the Muscogee Creek Nation where Arthur Montour, President of NWS and its National Sales Manager, Kim Porter, as well as the President of Grand River Enterprises were listed as giving a presentation on the Master Settlement Agreement.[5]

The following facts contained in the State's Second Amended Petition are treated as true in respect to a ruling on NWS' jurisdictional challenge:

1. NWS stored cigarettes in a warehouse located in Oklahoma until April 10, 2007, when it abandoned 568 cases of cigarettes that were subsequently buried in an Oklahoma land field. Amended Petition ¶18.

2. On February 22, 2008, the Oklahoma Tax Commission seized 189 full cases and 19 half cases of contraband Seneca brand cigarettes that NWS

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[4] Arthur Montour, the sole owner of NWS, testified in a NAFTA hearing that " . . . he made great personal efforts to promote on reservation sales of Seneca cigarettes . . . The evidence also shows that NWS expended large sums to promote the brand, paying for advertising, distribution of promotional goods, drawings, and the like."

See NAFTA AWARD, http//www.state.gov/documents/organization/156820.pdf.

[5] Although not available at the time, the State has now been provided with an audiotape of the forum presentations.

shipped to Bowen Wholesale, located in the State of Oklahoma. Amended Petition ¶19.

3. On February 29, 2008, the State of Oklahoma seized a number of cases of Seneca Brand Cigarettes from Norman Edward Enyart, Jr., an individual operating an internet pharmacy and smokeshop off of Indian land. Amended Petition ¶20.

4. Records from Bowen Wholesale showed the contraband tobacco products it possessed had been shipped by carrier from the Nevada International Trade Corporation, a Foreign Trade Zone ("FTZ") located in Las Vegas, Nevada. Records subpoenaed from the carrier and the Nevada FTZ revealed that from or about February, 2007, through October, 2008, NWS had also knowingly and unlawfully sold, distributed, acquired, held, owned, possessed, transported, imported, or caused to be imported for sale approximately 15,270 cases or 916,200 cartons of contraband Seneca Brand cigarettes manufactured by Grand River Enterprises to Muscogee Creek Nation Wholesale located in the State of Oklahoma. Amended Petition ¶21.

5. NWS had the cigarettes shipped from the manufacturer, Grand River Enterprises, in Canada to the Las Vegas FTZ. NWS, acting through a local Customs Broker in Las Vegas, then had the cigarettes released from the FTZ, and shipped to recipients in Oklahoma. NWS arranged with a common carrier for shipment of its product into Oklahoma, directed the carrier where to pick up and deliver the product, and

paid the shipping costs to have its product delivered into Oklahoma. At no time was the FTZ or carrier contacted by the recipient to arrange shipping. Amended Petition ¶22.

6. On October 15, 2008, the Oklahoma Tax Commission seized an additional 1,267 cartons of Seneca brand cigarettes from two cigarette retailers, located off of Indian land, which had been purchased from Creek Nation Wholesale. Window displays in these retailers, located off of Indian land, in Oklahoma reveal that NWS is marketing its Seneca brand cigarettes to consumers in Oklahoma through cash and merchandise giveaways which require product purchase. Amended Petition ¶23.

7. Arthur Montour, President of NWS, and Kim Porter, National Sales Manager of NWS, have personally traveled to Oklahoma to market their product to cigarette retailers doing business within the State of Oklahoma. Amended Petition ¶24.

8. Records from the United States Census Bureau show a population of 2,124 individuals, ages 18 and above, in Okmulgee County, Oklahoma who reported their heritage as Creek alone or any combination. A study by the Oklahoma Department of Health revealed the prevalence of cigarette smoking in the adult population of Native Americans in Oklahoma is 33 percent as compared to the general adult population rate of 23 percent. Native Americans in Oklahoma reported smoking, on average, about a half pack of cigarettes per day. Instead of an expected

consumption of 1 and one-half cartons of cigarettes per month, smokers of Creek heritage in Okmulgee County would have to exclusively smoke Seneca brand cigarettes at a rate of 98 and one-half cartons of cigarettes per month to consume the average of 1,149 cases of Seneca brand cigarettes shipped to Okmulgee County by NWS each month.[6] Amended Petition ¶25.

9. In December, 2008, investigators from the Oklahoma Attorney General's Office purchased Seneca and two other brands of contraband non escrowed, non-taxed cigarettes from smokeshops owned or licensed by the Muscogee Creek tribe of Oklahoma. No proof of tribal membership was required for the purchases. Statistically 98.5 percent of the sales of Seneca brand cigarettes by Muskogee Creek retailers in Okmulgee County are to non-tribal members. Amended Petition[7] ¶26.

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[6] Based upon evidence available at the time. The United States District Court for the Eastern District of Oklahoma in *Muscogee (Creek) Nation v. Henry*, 2010 WL 1078438, found that the State of Oklahoma lost close to thirteen million dollars in tax revenues from these sales in calendar year 2009 alone. This equates to twenty-six million cigarettes per month or 260 million cigarettes per year. In 2009, smokers of Creek heritage in Okmulgee County would have had to smoke 183.61 cartons of Seneca brand cigarettes per month to consume the amount of cigarettes shipped into Okmulgee County.

[7] NWS presented no evidence that any of the cigarettes it sold and caused to be transported to Muscogee Creek Nation Wholesale were purchased by members of the Muscogee Creek tribe.

The Petition for Certiorari, at pp. 5-6, contains many misstatements as to how Escrow Statutes and Complementary Statutes function. For example, the Participating Manufacturers ("PMs") do not share their profits with the State. Instead, under the Master Settlement Agreement they make a per-cigarette payment to the State based upon Federal Excise Taxes paid. Oklahoma does not protect the PMs' market share, by enforcing its Escrow Statute. Instead, the purpose of the escrow account is " . . . to guarantee a source of compensation and to prevent [non-participating] manufacturers from deriving large, short term profits and then becoming judgment proof before liability may arise." *See* 68 O.S. §360.4.

NWS claims that Oklahoma prohibits the sale of cigarettes by companies that do not contract with the State. There is no such requirement. The Attorney General maintains an online directory of all tobacco manufacturers that are in compliance with the MSA or escrow statutes. Non-compliant tobacco manufacturers are not listed on the directory and a stamping agent cannot affix a tax stamp, which is required for lawful cigarette sales, to any cigarette package of a manufacturer not listed in the directory. *See* 68 O.S. §360.4(B); and 68 O.S. §360.8(A).

Unlike the "Escrow Statute" which applies only to Tobacco Product Manufacturers, complementary legislation makes it unlawful for any person to: acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in

the state in violation of the Master Settlement Agreement Complementary Act. Title 68 O.S. §360.7(E). The purpose and effect of these statutes are explained in detail in Plaintiff's Second Amended Petition.

REASONS FOR DENYING THE PETITION

PROPOSITION I

THE OKLAHOMA SUPREME COURT'S PURPORTED APPLICATION OF THE "PURPOSEFUL DIRECTION" SPECIFIC JURISDICTION STANDARD INSTEAD OF A "PURPOSEFUL AVAILMENT" JURISDICTION STANDARD IS IRRELEVANT AS TO WHETHER THIS COURT SHOULD GRANT NWS' PETITION FOR CERTIORARI BECAUSE THE OKLAHOMA SUPREME COURT RULED NWS HAS SUFFICIENT CONTACTS WITH THE STATE OF OKLAHOMA TO SATISFY EITHER JURISDICTIONAL STANDARD.

A. The State's Cause of Action Against NWS Is Not a Contract Based Cause of Action.

The Petitioner, in a difficult to follow argument, claims the Oklahoma Supreme Court erred in applying a tort based, instead of contract based jurisdictional standard. The State's Second Amended Petition asserted cause of action against NWS is clearly not based upon contract but is a tort based cause of action. Under Oklahoma law:

> A contract is an agreement between two or more persons which creates an obligation to do or not do a particular thing; its essentials are parties capable of making a contract, their consent, a lawful object, and sufficient cause or consideration.

15 O.S. §§1 and 2 (2001).

A tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages. *See Patterson v. Beall*, 947 P.2d 617, 619, 1997 Okla. Civ. App. 64, ¶8 (citations omitted).

This action was brought against NWS for violation of the Master Settlement Agreement Complementary Act, 68 O.S. §§360.1 *et seq*. The Complementary Act provides that selling, offering, or possessing for sale cigarettes that are not on the Attorney General's Directory is a deceptive trade practice under the Oklahoma Consumer Protection Act. *See* 68 O.S. 360.7. Committing an unfair or deceptive trade practice is a tort. *See Patterson v. Beall*, 947 P.2d 617, 619, 1997 Okla. Civ. App. 64, ¶9. The remedy for a violation of the act is a disgorgement of the gains NWS received from violation of the Act.[8]

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[8] Contrary to Petitioners' assertions the Seneca brand cigarettes it shipped into Oklahoma were not "legal" cigarettes. First, these cigarettes are illegal because they did not bear the excise tax stamp of the State. Second, they are illegal because they are from a non escrow compliant tobacco product manufacturer whose brands had been banned from being shipped into or sold within the State of Oklahoma.

B. The Oklahoma Supreme Court Specifically Held That NWS' Contacts With the State of Oklahoma Were Sufficient to Meet a "Purposeful Availment" Standard.

The Petitioner argues that the Supreme Court of Oklahoma adopted a "'purposeful *direction*' specific jurisdiction standard" rather than a "purposeful *availment*" standard, thereby supposedly creating a conflict with decisions of this Court and the federal Courts of Appeals. Pet. at 10-11 (emphasis added). The court below did no such thing. To the contrary, it emphasized that it did not need to choose between these standards "because NWS has engaged in conduct that satisfies even the rigorous criteria advocated by Justice O'Connor" in her plurality opinion in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987) – namely, the "purposeful availment" standard. *See* Pet. App. at 14a.

The Oklahoma Court's application of the purposeful availment standard to the facts of this case is manifestly correct. Contrary to NWS' claim that the contracts in issue here were "entered into . . . and fully performed *outside*" Oklahoma (Pet. at I, emphasis added), the record evidence demonstrates that NWS has directly and repeatedly solicited business from tribes in Oklahoma, created an elaborate distribution system for delivering cigarettes into Oklahoma, and arranged to channel *hundreds of millions* of contraband cigarettes into the State. As emphasized by the court below, "[t]o claim, as Native Wholesale Supply does, that it does not know, expect, or intend

that the cigarettes it sells to [Oklahoma tribal wholesalers] are intended for distribution and resale in Oklahoma is simply disingenuous." Pet. App. at 18a; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) ("parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities").

NWS has had significant, sizeable and purposeful contacts with the State of Oklahoma that are long lasting and justify personal jurisdiction under any jurisdictional standard, including the more restrictive "purposeful availment" standard argued by the Petitioner. The Second Amended Petition alleged that NWS directed the sale and shipments of more than 100,000,000 untaxed and non escrow compliant cigarettes per year into and through the State of Oklahoma to the Muscogee (Creek) Nation of Oklahoma. We now know that the true figure is almost 2 ½ times that amount. This alone should be sufficient to satisfy the Due Process clause's requirement of "minimum contacts" with the forum state.

In *Asahi*, 480 U.S. at 121-22 Justice Stevens presented a third view of "purposeful availment" which includes the consideration of the volume, value and hazardous character of the product at issue. The facts of this case even meet the third view held only by Justice Stevens. In this case the product is cigarettes, a highly regulated, and hazardous product. NWS profits from the high volume of its sale of cigarettes

from a non-compliant tobacco manufacturer to Oklahoma consumers by laundering its sales through tribal retailers licensed by the Muscogee Creek Nation. NWS is able to market cigarettes from the non-compliant manufacturer to Oklahoma residents at substantially lower costs than compliant manufacturers because these cigarettes are sold without payment of Oklahoma excise taxes and without the manufacturer funding an escrow account. NWS not only increases the volume of its sales, but its profits as well. Through the illegal acts of NWS, the State of Oklahoma not only loses millions of dollars of lost tax revenue but also suffers an increase in the number of Oklahomans, including juveniles, suffering severe illness and death with the corresponding increase in health care costs to the State of Oklahoma. Because there is no funded escrow account, the State also loses any ability to recover any of its health care costs from the non-compliant manufacturer.

There was no error in finding NWS had sufficient contacts with the State of Oklahoma for the court to exercise personal jurisdiction.

PROPOSITION II

CERTIORARI SHOULD BE DENIED ON THE INDIAN COMMERCE CLAUSE ISSUE.

A. Despite the Allegations of NWS, No "*Inter-Tribal Commerce*" Is Involved in the Case at Bar Because NWS Is Not Owned or Operated by an Indian Tribe. Instead, NWS Is Merely a Private Corporation Operating for Its Own Profit and Financial Gain.

NWS is not a Tribal enterprise. *See* ¶¶1-3 of Oklahoma's Second Amended Petition, Attached to Pet. at 50(a). It is nothing more than a private business that happens to be owned and operated for the individual profit of a man who claims to be a member of an Indian Tribe:

> ARTHUR MONTOUR, being duly sworn, deposes and says:
>
> 1. I am the President and *sole owner* of Defendant, Native Wholesale Supply ("NWS"). I am a Native American and member of the Seneca Nation.

¶1 of Affidavit of Arthur Montour Attached to Pet. at 65(a)-66(a) (emphasis added); *see also* ¶2 of Affidavit of Arthur Montour Attached to Pet. at 66(a). Despite this fact, NWS, in its Petition for Writ of Certiorari, erroneously refers to its transactions with Muscogee (Creek) Wholesale as being "*intertribal commerce*":

> [T]he Oklahoma Supreme Court held: (1) that Native Wholesale "is not clothed with tribal immunity"; and (2) "there is no blanket ban

> on state regulation of *intertribal commerce* even on a reservation."
>
> It is on this second issue, application of the Indian Commerce Clause to on reservation *intertribal commerce*, that the Oklahoma Supreme Court misapplied the Indian Commerce Clause and misinterpreted this Court's decisions addressing the scope of that constitutional provision.
>
> * * *
>
> Only Congress can regulate the right of *tribes* to engage in Indian commerce with other *tribes*. Here, the Oklahoma Supreme Court's decision sanctioning that State's lawsuit against Native Wholesale directly interferes with this congressional power, and unduly burdens Indian commerce, all in violation of the Indian Commerce Clause.

Pet. at 29 and 32 (emphasis added) (internal citations omitted). Accordingly, it is clear that NWS is incorrectly relying on nothing more than its owner's asserted Tribal membership[9] in the Seneca Nation in an

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[9] A corporation may only be considered to be entitled to the same attributes of sovereignty as those possessed by an Indian Tribe if the corporation is actually owned by the Tribe, controlled by the Tribe, and operated for governmental purposes of the Tribe:

> It is *possible* that a corporation owned by Indian shareholders *might* be immune from state taxation if it is *acting as an equivalent to the Indian tribe itself*. For example, a corporation has been held to be entitled to the same sovereign immunity as the Indian

(Continued on following page)

attempt to argue that he may operate a private business in an unlawful manner free from any and all State regulation. NWS is wrong.

Mr. Montour's claimed tribal membership in no way confers any type of sovereign status on the private business he operates for his own financial gain, as individual tribal members do not possess the attributes of sovereignty that an Indian Tribe does:

> The doctrine of sovereign immunity which was applied in *United States v. United States Fidelity & Guaranty Co.*, does *not* immunize the *individual members* of the Tribe.

Puyallup Tribe, Inc. v. Dept. of Game of State of Wash., 433 U.S. 165, 171-72 (1977) (emphasis added) (internal citation omitted). Specifically on this point,

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> Tribe when it is *organized under tribal laws; it is controlled by the Tribe; and it is operated for government purposes.*
>
> * * *
>
> But none of these conditions are present here and plaintiff concedes it is not acting as the Tribe's agent nor is it incorporated under the laws of the Tribe.

Baraga Products, Inc. v. Commissioner of Revenue, 971 F. Supp. 294, 296-97 (W.D.Mich.1997) (emphasis added) (internal citations omitted). NWS does not allege any of these factors in relation to the Seneca Nation of New York. Instead, NWS' assertion of Tribal status stems from the mere claim of its President and sole owner that he is a member of the Seneca Nation of New York. *See* ¶¶1-3 of Oklahoma's Second Amended Petition, Attached to Pet. at 50(a).

this Court has ruled that "Congress did not intend to make tribal members "super citizens" who could trade in a traditionally regulated substance free from all but self-imposed regulations." *Rice v. Rehner*, 463 U.S. 713, 734 (1983); *see also Squaxin Island Tribe v. State of Wash.*, 781 F.2d 715, 719-20 (9th Cir. 1986). Therefore, Mr. Montour cannot rely on his asserted tribal membership to seek some type of "super citizen" status to operate a business that engages in the trade of a traditionally regulated substance free from all but self-imposed regulation. This Court has already precluded NWS' argument. *See Rice*, 463 U.S. at 734; and *Squaxin Island Tribe*, 781 F.2d at 719-20. Simply put, Mr. Montour, as a mere Tribal member, does not possess the attributes of sovereignty held by an actual Indian Tribe. Therefore, it is axiomatic that Mr. Montour cannot confer a sovereign status onto NWS which he himself does not have. NWS is not a Tribal enterprise.

Even if tribal members did possess the sovereignty afforded to Indian Tribes, which they do not, Mr. Montour asserts that NWS is a *corporation*:

> 2. In or around 2001, NWS was chartered as a *corporation* by the Sac and Fox Tribe of Oklahoma.[10] I have been the President and

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[10] NWS does not allege that it is a Tribal enterprise of the Sac and Fox Nation. Instead, it merely states that it is incorporated by the Sac and Fox Nation. Mere businesses which pay licensing fees to a Tribe are not Tribal enterprises and stand in sharp contrast to cases involving economic entities established

(Continued on following page)

> sole owner of NWS since it was chartered. NWS' [sic] office has always been located on the Seneca Cattaraugus Indian Territory in Gowanda, New York.

¶2 of Affidavit of Arthur Montour Attached to Pet. at 66(a) (emphasis added). Since NWS is incorporated, it does not possess the same attributes as Mr. Montour because incorporated businesses are separate and distinct from their owners. It is "[a] basic tenet of American corporate law that [a] corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). A corporation and its owners and shareholders have differing rights and liabilities. *See id.* Due to the distinction between a corporation and its individual members and stockholders, an incorporated business entity cannot argue that it should be considered an enrolled member of an Indian Tribe simply because its sole shareholder is. *See Baraga Prds., Inc. v. Comm'r*, 971 F. Supp. 294, 296 (W.D.Mich.1977); *see also Ariz. Dept. of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 34 (1999). "[A] corporation is not an 'Indian' for purposes of immunity" from the application of state law. *Baraga Prds., Inc.*, 971 F. Supp. at 298. Therefore, even if Mr. Montour's claimed tribal membership somehow accorded him a "super citizen" status, which it does not, NWS would

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by the tribe and managed by the tribe for the benefit of the tribe. *See City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 WL 705815 at *7 (E.D.N.Y.2009); *See also* ¶¶1-3 of Oklahoma's Second Amended Petition, Attached to NWS' Petition for Writ of Certiorari at 50(a).

not possess the same "super citizen" status because it and its President are separate and distinct from one another. Thus, while Mr. Montour might be a Tribal member of the Seneca Nation of New York, the separate and distinct corporate entity NWS is not. NWS is not a Tribal enterprise or an Indian.

There cannot be "*intertribal commerce*" without at least *two* Tribes involved. Since NWS is not a Tribe, a Tribal enterprise, or even an Indian, there were not *two* Indian Tribes involved in the subject transactions. Instead, the only commerce being regulated in this case was that of a private corporation engaging in business for its owner's unlawful profit and financial gain. Thus, the "*intertribal commerce*" issue raised by NWS is premised upon misstatements of fact, and law applied thereto. Since NWS is a private incorporated business entity, not a Tribal enterprise, or an Indian, the "*intertribal*" Indian Commerce Clause issue raised by NWS would not be at issue even if this Court accepted Certiorari. *See* U.S. Sup.Ct.R. 15.2. The Petition for Writ of Certiorari should be denied.

B. Even If NWS Was a Tribal Enterprise it Was *Not* Shipping and Selling the Subject Contraband Cigarettes to *Members* of the Seneca Nation. Therefore, the Petition for Certiorari Should Be Denied as this Court Has Already Ruled That There Is No Sovereign Interest Involved When a Tribe Sells Products to People Who Are *Not* Members of the Same Tribe.

Even if NWS was a Tribal enterprise, which it is not, there would be no sovereign interest involved in its illegal transactions because it would have been shipping and selling the contraband cigarettes at issue to *non-Seneca Tribal members*.

In the current case, NWS alleges that it was chartered as a corporation by the Sac and Fox Nation of Oklahoma. Even though it alleges to be chartered as a corporation by the Sac and Fox Nation, its President and sole owner is *not* a member of that Tribe. Instead, NWS' President and sole owner states that he is a member of the Seneca Nation.[11] Regardless of which Tribe NWS attempts to seek a strained affiliation with, NWS was *not* shipping and selling the contraband cigarettes at issue to the Seneca Nation, the Sac and Fox Nation, entities owned and/or operated

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[11] NWS has the burden of proving it is entitled to the protections of Indian sovereignty. Far from carrying this burden, NWS does not even clearly identify which Tribe's semi-sovereign status it is asserting. *See Golden Feather Smoke Shop, Inc.*, 2009 WL 705815 at *3-*4 (E.D.N.Y.2009).

by either Tribe, or members of either Tribe. Instead, NWS was shipping and selling the illegal cigarettes to an entity allegedly owned and operated by yet another *third and unrelated Tribe*, the Muscogee (Creek) Nation of Oklahoma, for eventual re-sale to the general non-tribal Oklahoma public at large who are also non-Senecas.

This Court settled the issue of state regulatory power over sales transactions involving *non-tribal members* in the case *Rice v. Rehner*, 463 U.S. 713 (1983). In that case, Ms. Rehner was a member of the Pala Indian Tribe and a licensed Indian Trader. Ms. Rehner was operating a general store on the Pala Tribe's Reservation in California. Ms. Rehner's general store was not owned or operated by the Pala Indian Tribe. Ms. Rehner's general store was selling liquor for off-premises consumption. California state law required Ms. Rehner to obtain a state liquor license. Ms. Rehner filed a declaratory judgment action asking the Court to rule that the doctrine of Indian Sovereignty pre-empted the State of California's regulatory authority over her general store. The *Rice* Court rejected Ms. Rehner's claims.

The *Rice* Court explicitly ruled that, in relation to her general store's sale of alcohol to *non-members* of the Pala Indian Tribe, *both* Ms. Rehner *and the Pala Tribe* were foreclosed from arguing that the doctrine of Tribal Sovereignty pre-empted state regulation in this area, even on Reservation land:

> *To the extent that Rehner seeks to sell* to non-Indians, or *to Indians who are not members of the tribe. . . . the decisions of this Court have already foreclosed Rehner's argument that the licensing requirements infringe upon tribal sovereignty.*
>
> * * *
>
> *Regulation of sales to* non-Indians or *non-members of the Pala Tribe simply do not contravene the principle of tribal self-government*, and, *therefore, neither Rehner nor the Pala Tribe have any special interest that militates against state regulation in this case,* providing that Congress has not pre-empted such regulation.
>
> * * *
>
> If there is any interest in tribal sovereignty implicated by imposition of California's alcoholic beverage regulation, it exists only insofar as the State attempts to regulate Rehner's sale of liquor to other *members of the Pala Tribe on the Pala reservation.*

Rice, 463 U.S. at 720, 720 n. 7, 721 (internal quotations omitted) (emphasis added); *see also Oklahoma Tax Comm. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 512-13 (1991); *Duro v. Reina*, 495 U.S. 676, 686-87 (1990) ("We have held that States may not impose certain taxes on transactions of tribal members on the reservation because this would interfere with internal governance and self-determination. . . . *But this rationale does not*

apply to taxation of nonmembers, even where they are Indians.") (emphasis added); and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160-61 (1980) (State may "impose its taxes on [tribal sales to] Indians not members of the Tribe," because such "nonmembers are not constituents of the governing Tribe" and "stand on the same footing as non-Indians").[12]

In the case at bar, NWS is advancing the same flawed argument which this Court rightly rejected in *Rice* and the other cited cases. That is, NWS is attempting to indirectly assert the semi-sovereign status of the Seneca Nation of New York to make the

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[12] NWS cites a number of federal economic development statutes to support its flawed argument that Oklahoma's MSACA is pre-empted. *See* Pet. at 31-32. However, this Court has already ruled that in cigarette transactions:

> The federal statutes. . . . evidence to varying degrees a congressional concern with fostering tribal self-government and economic development, but none goes so far as to grant *tribal enterprises* selling goods to *non-members* an artificial competitive advantage over all other businesses in a State.

Colville, 447 U.S. at 155 (emphasis added). Thus, not even *actual Tribal enterprises* may rely on these economic development statutes to gain the artificial competitive advantage being sought by NWS. This applies with even more force in this case since *NWS is not a Tribal enterprise*. Moreover, the strong federal policy embodied in such laws as the Contraband Cigarette Trafficking Act, 18 U.S.C. §§2341 *et seq.*, and the Prevent All Cigarette Trafficking Act, Pub. L. No. 111-154, 124 Stat. 1087, is to *support* and *facilitate* state taxation and regulation of such sales, including by tribes and tribal retailers.

erroneous claim that Oklahoma's regulation of contraband cigarette sales to *non-Seneca members* somehow contravenes the principle of tribal self-government. However, as noted by the *Rice* Court, Tribal Sovereignty has no application in this case because *NWS is not shipping and selling the contraband cigarettes to members of the Tribe in which the President claims membership, nor is NWS shipping and selling the contraband cigarettes to members of the Tribe of NWS' incorporation. See Rice*, 463 U.S. at 720, 720 n. 7, 721. Therefore, even if NWS was a Tribal enterprise, which it is not, this Court has repeatedly rejected its argument. There is no sovereign interest involved when sales transactions involve members of a different Tribe. The Petition for Writ of Certiorari should be denied.

C. Despite the Allegations of NWS That Only "On Reservation" Activities Are Involved, NWS Shipped, Transported, and Sold the Subject Cigarettes Directly Into the State of Oklahoma, Far Beyond the Borders of the Seneca Nation Reservation. This Court Has Repeatedly Ruled That No Sovereign Interest Is Involved When "Off Reservation" Conduct Is Involved.

NWS suggests that it does nothing more than accept cigarette orders at its office allegedly located within the boundaries of the Seneca Nation Reservation. According to NWS' fallacious argument, after such orders are placed, it has no further involvement.

See Pet. at 29-33; *see also* ¶¶4-6 of Affidavit of Arthur Montour Attached to Pet. at 66(a)-67(a). Therefore, according to NWS, its action occurred entirely on the Seneca Nation Reservation. However, as outlined below, this statement is simply false. Accordingly, the Petition for Writ of Certiorari should also be denied because it is advancing misstatements of fact, and law applied thereto, concerning the *location and nature* of the activities complained of in Oklahoma's Second Amended Petition. *See* U.S. Sup.Ct.R. 15.2.[13]

In this case, NWS takes orders and imports cigarettes from Canada at its office allegedly located on the Seneca Nation Reservation in New York. NWS then arranges for the cigarettes to be shipped and sold to Muscogee (Creek) Wholesale in Okmulgee, Oklahoma for resale to non-tribal Oklahoma consumers. *See* ¶¶19-31 of Oklahoma's Second Amended Petition, Attached to Pet. at 58(a)-62(a). However, it must be *stressed* that in many instances, if not all instances, *the cigarettes sold, shipped and/or caused to be shipped by NWS never even pass through the Seneca Nation Reservation.* Instead, the cigarettes, after they pass customs, are stored in Nevada and/or Western New York – *not on the Seneca Nation Reservation. See* ¶¶3-5 of Affidavit of Arthur Montour Attached to Pet. at 66(a)-67(a). Furthermore, far from

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[13] As discussed above, NWS recently pled guilty to federal criminal obstruction-of-justice charges for having made virtually identical claims about its supposed lack of jurisdictional contacts with the State of Washington. *See* p. 3 n. 1 *supra*.

merely accepting unsolicited cigarette orders at its office, it was NWS that actually arranged for the *off reservation* shipment and transportation of the contraband cigarettes. As noted in Oklahoma's Second Amended Petition, shipping invoices have been obtained that show that it was NWS, not Muscogee (Creek) Wholesale, that paid for the transportation of the cigarettes into Oklahoma. *See* ¶¶19-22 of Oklahoma's Second Amended Petition, Attached to Pet. at 58(a)-59(a). Therefore, even if one were to take NWS' statements regarding the cigarette orders being accepted at its office as true, it still does not account for the shipping activities of NWS occurring *off* of the Seneca Nation Reservation and over Oklahoma roadways. The mere possession and transportation of these contraband cigarettes was, in and of itself, illegal.[14]

NWS is not merely shipping and transporting the contraband cigarettes. Instead, NWS is engaged in a calculated business plan to sell huge quantities of tax and escrow free contraband cigarettes to the general non-Indian Oklahoma public at large on and off the supposed Indian land of the Muscogee (Creek) Tribe of Oklahoma. *See* ¶¶19-31 of Oklahoma's Second

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[14] It shall be unlawful for a person to:

a. sell or distribute cigarettes, or

b. acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the state in violation of the Master Settlement Agreement Complementary Act.

68 O.S. §360.7(E); *see also* 68 O.S. §360.7(B).

Amended Petition, Attached to Pet. at 58(a)-62(a). As alleged in the Second Amended Petition, NWS knew that the vast majority of the cigarettes that it was shipping to Muscogee (Creek) Wholesale were eventually being sold to the general non-Tribal Oklahoma public. This is clear when one considers the sparse population of Muscogee (Creek) Tribal members in the area compared to the sheer volume of cigarettes NWS was purposefully directing to Muscogee (Creek) Wholesale. *See* ¶¶25-26 of Oklahoma's Second Amended Petition, Attached to Pet. at 60(a)-61(a); *see also Muscogee (Creek) Nation v. Henry*, 2010 WL 1078438, *5-*6. NWS' deliberate business plan was to undercut other non-contraband cigarette sales made by legitimate cigarette retailers in the area by having its illegal cigarettes sold on Muscogee (Creek) Indian land free from state tax and escrow requirements. Moreover, in many instances, the contraband cigarettes were being shipped to locations in Oklahoma that were not even located on Muscogee (Creek) Indian land for eventual re-sale to the general public. *See* ¶¶18-23 of Oklahoma's Second Amended Petition, Attached to Pet. at 58(a)-60(a). Thus, despite the allegations in the Petition for Writ of Certiorari, NWS' activities *involve far more than accepting unsolicited cigarette orders and are occurring well beyond the borders of the Seneca Nation Reservation.*[15]

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[15] To the extent NWS might be asserting that it is a Tribal enterprise of the Sac and Fox Nation of Oklahoma, the same logic applies.

This Court held long ago that "[a]bsent express federal law to the contrary, Indians[16] going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) (and collection of authorities cited therein). Therefore, even if NWS was a Tribal enterprise, or an Indian, neither of which is true, there would be no sovereign interest involved in this case because NWS was engaging in unlawful activity beyond the borders of the Seneca Nation Reservation subject to non-discriminatory State regulation. The Petition for Writ of Certiorari should be denied because it is advancing misstatements of fact, and law applied thereto, concerning the *nature and location* of the activities complained of in Oklahoma Second Amended Petition. *See* U.S. Sup.Ct.R. 15.2.

D. Despite the Allegations of NWS, this Lawsuit Is "Direct" Regulation of *Its* Unlawful Shipping and Sales Activity Occurring in Oklahoma. This Is Not, as NWS Puts it, "Indirect" Regulation of Out-of-State Tribal Purchases.

Finally, because it is clear that NWS is not a Tribal enterprise, that there is no sovereign interest

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[16] As noted earlier, NWS and its sole owner are separate and distinct. Thus, while Mr. Montour might be an Indian, NWS is not.

involved in the sale of goods to non-tribal members, and that there is no sovereign interest in unlawful activities occurring beyond Reservation boundaries, NWS attempts to shift this Court's focus away from its illegal conduct and onto the Muscogee (Creek) Tribe. In doing so, NWS incorrectly states that the purpose of the current lawsuit is to "indirectly" regulate the purportedly "out-of-state" purchases being made by Muscogee (Creek) Wholesale. *See* Pet. at 29-35. In advancing its flawed theory, NWS relies on case law interpreting the Indian Trader Statutes to assert the broad proposition that any and all application of Oklahoma law is pre-empted in regard to its unlawful shipping and sales activity merely because it is dealing with an alleged arm of the Muscogee (Creek) Tribe. As shown below, NWS' argument is wrong for at least *three* reasons.

First, to be an "Indian trader" a person is required to be appointed by the Commissioner of Indian Affairs and secure a license from same. *See* 25 U.S.C. §§261 and 262. In the lower Court proceedings, NWS produced no evidence as to its status as an "Indian trader," nor did it allege to be an "Indian trader." Thus, this is a new argument being advanced that is not properly considered on appeal. *See* U.S. Sup.Ct.R.'s 14.1(g)(I); 15.2; and 15.4.[17]

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[17] Oklahoma's response to these new arguments raised by NWS should not be construed as an admission that they are properly at issue. Oklahoma's response is done merely out of an

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Second, the cases cited by NWS lend no support to its flawed argument because such cases merely recognize the general principle that a State tax imposed on Indian traders' "on-reservation" transactions with a Tribe *may* be pre-empted by the Indian Trader Statutes if the tax's financial burden is ultimately passed on to the Tribe with which the trader was dealing. However, in this case, the MSACA does not impose a tax, or any type of financial obligation for that matter, on NWS. Since no financial obligation is imposed on NWS, it is clear that no financial obligation is passed on by NWS to Muscogee (Creek) Wholesale. Accordingly, the Indian Trader Statute cases cited by NWS are irrelevant. *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (State motor fuel tax imposed on upstream distributor that ultimately delivered fuel to Tribal entity not pre-empted by Indian Trader Statutes because it imposed no financial burden on Tribe).

Third, the Indian Trader Statute cases cited by NWS dealt with the trade of goods, products, and/or services that were otherwise *legal* – such as tractors in *Central Machinery* and motor fuel in *Chickasaw Nation*. Conversely, in this case, the mere act of possessing the tax and escrow free contraband cigarettes in dispute is *illegal*. *See* 68 O.S. §360.7(E); *see also* 68 O.S. §360.7(B). Since the mere possession of the

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abundance of caution and in an attempt to make sure the Court is fully informed.

contraband cigarettes is *illegal*, the cases cited by NWS regarding the trade of *legal* goods, products, and/or services are inapposite. Moreover, this Court has already ruled that the Indian Trader Statutes do not pre-empt *any and all* State regulation of persons or entities trading with Tribes:

> Although *Moe* and *Colville* dealt . . . *directly* with claims of interference with tribal sovereignty, the reasoning of those decisions requires *rejection of the submission that 25 U.S.C. §261 bars any and all state imposed burdens on Indian traders.*

Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 74 (1994). Instead, it has already been determined that the Indian Trader Statutes do not bar the States from imposing *reasonable regulatory burdens* upon Indian traders. *See id.* at 74. *In fact, this Court has, on more than one occasion, held that States are free to regulate the activities of upstream wholesalers and distributors that are shipping and selling illegal cigarettes to Tribal entities. See Milhelm*, 512 U.S. at 71-75 (Indian Trader Statutes do not pre-empt State regulatory law imposing record keeping requirements and quota restrictions on number of tax free cigarettes upstream supplier and deliverer could ship and sell to Tribal entities); *Citizen Band Potawatomi Ind. Tr. of Okla.*, 498 U.S. at 514 (Sovereignty interests do not pre-empt State from regulating off reservation transportation and shipping of contraband cigarettes through seizures while contraband en route from upstream

wholesaler to Tribal entity); and *Colville*, 447 U.S. at 144-45, 144 n. 18, and 161-62 (Sovereignty interests do not pre-empt State from regulating transportation and shipping of contraband cigarettes purchased with Tribal funds through seizures while contraband en route from upstream out-of-state dealer that is licensed Indian Trader to in-state Tribe that eventually distributes illegal cigarettes to in-state on-reservation Tribal Outlets that are also operated by licensed Indian Traders acting as retailers for Tribe). In this case, just like in *Milhelm*, *Citizen Band Potawatomi*, and *Colville*, the MSACA is nothing more than a *reasonable regulatory burden* imposed on NWS to staunch the flow of *illegal* tax and escrow free contraband cigarettes to *non-tribal* consumers in Oklahoma. Under the *reasonable regulatory burdens* imposed by the MSACA, NWS remains free to sell whatever lawful product it wants, including cigarettes, to whoever it wants, at whatever price it desires, and in whatever amount. There is no need to re-visit the above-cited precedential rulings of this Court.

As described above, this lawsuit is not, as NWS puts it, "indirect" regulation of the Muscogee (Creek) Tribe. That is a misstatement of fact, and law applied thereto, concerning the *nature* of this lawsuit. *See* U.S. Sup.Ct.R. 15.2. Instead, this lawsuit is being brought against NWS, a private, non-Tribal enterprise, as a "*direct*" result of its unlawful shipping and sales activities occurring in Oklahoma. NWS may not assert the semi-sovereign status of the Seneca Nation in an attempt to free itself from reasonable regulatory

burdens merely because its President and sole owner alleges to be a member of that Tribe. This is particularly true since the facts of this case show that no sovereign interests would be involved even if NWS was actually a Tribal enterprise, which it is not. There was no "*intertribal commerce*."

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 10-754

In the Supreme Court of the United States

NATIVE WHOLESALE SUPPLY, A CORPORATION CHARTERED BY THE SAC AND FOX TRIBE OF OKLAHOMA,
Petitioner,

v.

STATE OF OKLAHOMA EX REL. W.A. "DREW" EDMONDSON, ATTORNEY GENERAL OF OKLAHOMA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

PETITIONER'S REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

The Brief in Opposition fails to confront the central issue raised in the Petition: the improper projection of state regulatory power beyond state borders and beyond constitutional limits. That issue is central both to the state's exercise of specific personal jurisdiction over out-of-state conduct by this foreign corporation, and to the state's attempt to prevent an Indian tribe from leaving the state to trade with other Indians.

I. THE OKLAHOMA COURT'S PERSONAL JURISDICTION DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND THE CIRCUIT COURTS OF APPEALS.

A. Respondent Ignores the Historic Development of This Court's Tort-Based Personal Jurisdiction Standard Which was Erroneously Applied by the Oklahoma Court.

Respondent concedes that purposeful availment is the appropriate standard. Br. in Opp'n 2, 15. Yet Respondent misinterprets the limitations of that standard and ignores its historic development. Contrary to Respondent's contention, the purposeful availment standard did not spring from *Asahi* like Athena from Zeus' head. Instead, the *Asahi* plurality discussed the historic development of "purposeful availment" as enunciated in *Hanson*.[1] *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 109

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[1] *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

(1987). The *Asahi* Court then adopted the less stringent *Calder* 'purposeful direction' standard applicable in tort cases.[2] *Asahi*, 480 U.S. at 122 (Stevens, J., concurring in part) ("I see no reason in this case for the plurality to articulate 'purposeful direction' or any other test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts"). In other words, the Court in *Asahi* addressed a tort cause of action, and enunciated a tort jurisdiction standard that was more expansive than the limited purposeful availment standard outlined in *Hanson* (personal jurisdiction over trust and trustee) and *Burger King* (personal jurisdiction in contract action).[3]

In failing to understand the historic development of these alternative standards, Respondent experienced the same confusion that plagued the Oklahoma court. App. to Pet. Cert. ("App.") 13a-14a ("The *Asahi* decision has created significant confusion in lower courts over the constitutional standard for minimum contacts under the stream-of-commerce theory"). As a result of its confusion, the Oklahoma court improperly relied on the tort-based "stream-of-commerce" theory to find specific personal jurisdiction in this regulatory action. App. 18a (Petitioner "deliver[s] its products into the stream of commerce that brings it into Oklahoma"). Although simply placing a product in the "stream-of-commerce" may be sufficient in a tort action, something more is required for a state to regulate beyond its borders. *BMW of N. Am. v. Gore*,

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[2] *Calder v. Jones*, 465 U.S. 783, 790 (1984).

[3] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

517 U.S. 559, 572-73 (1996) ("Alabama does not have the power, however, to punish [defendant] for conduct that was lawful where it occurred"). If a state's extra-territorial regulatory power were coextensive with its power to bring a foreign tortfeasor before its courts, then the state with the most restrictive regulations would dictate national product standards, New Jersey would set standards for construction of recycling machines in Great Britain, and North Carolina would regulate manufacturing of tires in Turkey and sold in France.

The Oklahoma decision confused these two personal jurisdiction standards, resulting in conflict with this Court's decisions in *Hanson*, *Calder*, and *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), not a single one of which was even cited by Respondent. The state court decision also conflicts with decisions of the Courts of Appeals [Pet. 12-15, ignored in Br. in Opp'n] which have applied this Court's distinction between "purposeful availment" and the less rigorous "purposeful direction" standard applicable in tort actions.

B. State Regulatory Jurisdiction Does Not Sound in Tort.

Contrary to Respondent's novel argument that all that is not contract is tort: "'The state never can sue in tort in its political or governmental capacity." W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 2, at 7 (5th ed. 1984). Indeed, government systems of regulation differ significantly from tort law. Dan B. Dobbs, *The Law of Torts* § 5, at 9 (2000) ("Probably no practicing lawyers [sic] would think that tort law and regulatory law systems are alike"). The source of

regulatory power is not grounded in tort, and the "source of the injury" does not affect the scope of regulatory authority:

> It is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury which is the criterion of Congressional power.

United States v. Wrightwood Dairy Co., 315 U.S. 110, 121 (1942).

C. Respondent's General Jurisdiction Facts do not Support Exercise of Specific Jurisdiction.

Respondent's pleading in the trial court raised only one "Violation by Defendant," which Respondent set out in two paragraphs claiming that: 1. Seneca brand cigarettes "have not been approved for sale within the State of Oklahoma" [paragraph 30]; and 2. Petitioner has "sold, distributed, acquired, held, owned, possessed, transported, imported, or caused to be imported for sale . . . Seneca brand cigarettes . . . to Muscogee Creek Nation Wholesale" [paragraph 31]. App. 61a, 62a. Respondent chose, for whatever reason, to limit its case to the out-of-state sale of a single brand of cigarettes to the Muscogee Creek Tribe, and sought specific personal jurisdiction over that single, limited claim. The only facts relevant to the issue of specific jurisdiction here are those out of which Respondent's single claim arises. *Platten v. HG Berm. Exempted Ltd.*, 437 F.3d 118, 138 (1st Cir. 2006) ("In specific jurisdiction terms, plaintiffs have not shown a 'material connection' between their injuries and HG Limited's contacts in Massachusetts and therefore

cannot meet the relatedness requirement of the due process inquiry"); *Burger King*, 471 U.S. at 472 (for purposes of specific jurisdiction, injuries must "arise out of or relate to" alleged forum related activities).

Ignoring this basic requirement, the Brief in Opposition contains a lengthy recitation of alleged "facts" – only two of which apply to the relatedness requirement for specific jurisdiction. Those are number 4 on page 7 (same as 4 on page 9) (alleging Petitioner "arranged, paid for and directed the shipping of its cigarettes" to the Muscogee Tribe); and number 7 on page 10 (same as 6 on page 8) (alleging Petitioner's president and national sales manager "personally traveled to Oklahoma to market their product").[4] Yet only the alleged sales trip occurred in Oklahoma and it is insufficient to support specific personal jurisdiction. *E.g., Morris v. Barkbuster, Inc.*, 923 F.2d 1277, 1279 (8th Cir. 1991) (three trips to forum insufficient for specific jurisdiction).

Petitioner's out-of-state storage and shipping procedures are immaterial under basic principles of commercial law, as discussed in the Petition yet ignored in the Brief in Opposition. Oklahoma law confirms the sales at issue occurred either on the Seneca Nation when title passed to the Muscogee Creek Tribe, or in Nevada at the time and place of shipment. *Sesow v. Swearingen*, 552 P.2d 705, 707

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[4] The other alleged facts listed in the Brief in Opposition relate only to abandonment and disposal of cigarettes (which by definition could not have ended up in possession of the Muscogee Creek Tribe), non-Muscogee Creek smoke shops, census data and purchases by state agents from third parties.

(Okla. 1976).[5] These sales were initiated by the Tribe, and once title transferred shipment was conducted by a third party not involved in this case and acting as the agent of the Tribe. *Butler v. Beer Across Am.*, 83 F. Supp. 2d 1261, 1264 (D. Ala. 2000). Petitioner's assistance in arranging transportation of product owned at shipment by the Tribe does not alter these basic commercial law concepts.

Respondent limited its claim to Petitioner's out-of-state sale of a single brand of cigarettes to the Tribe, and sought specific personal jurisdiction over that single, limited claim. Now, apparently unhappy with its pleading and the record it presented to the court below, Respondent inappropriately argues facts outside the record, and engages in vitriolic ad hominem attacks on Petitioner and its counsel.[6] If Respondent thinks people have lied under oath, it has a remedy. Peppering its Brief with false accusations simply confirms the inadequacy of its argument, and its record.

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[5] Oklahoma defines "sale" as the passing of title from the seller to the buyer for a price. Okla. Stat. tit. 12A, § 2-106(1). Oklahoma also recognizes that title to goods passes from the seller to the buyer at the time and place of shipment. Okla. Stat. tit. 12A, § 2-401(2)(a).

[6] *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158 n.16 (1970) ("the statement itself is not in the record of the proceedings below and therefore could not have been considered by the trial court. Manifestly, it cannot be properly considered by us in the disposition of the case").

II. RESPONDENT CONFUSES CONSTITUTIONAL INDIAN COMMERCE CLAUSE ISSUES WITH TAXATION AND SOVEREIGN IMMUNITY ARGUMENTS.

A. Congressional Power is the Issue in this Case.

Oklahoma wants to reach outside its borders to regulate the kind and price of cigarettes purchased by an Indian tribe from an Indian vendor doing business in Indian Territory outside Oklahoma. The United States Constitution vests that regulatory authority exclusively in Congress. U.S. Const. art. I, § 8, cl. 3; *Seminole Tribe v. Florida.*, 517 U.S. 44, 62 (1996). The Indian commerce clause requires congressional permission before states can regulate the sale of liquor, apply state health and education laws, or regulate other commercial activities by Indians on reservations.[7] Congress has not granted such authority over the Indian commerce at issue here.

B. Respondent Concedes That This is Not a Tax Case.

The right to regulate is no greater than the right to tax. *Quill Corp. v. North Dakota*, 504 U.S. 298, 319 (1992) (Scalia, J. concurring) ("It is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax"). Yet Respondent cannot tax the out-of-state purchase at issue in this case: "the [Oklahoma law at issue] does not impose a tax, or any type of financial obligation for

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[7] Pet. at 28 n.23.

that matter, on NWS." Br. in Opp'n 34. Tellingly, although Petitioner never paid a penny in taxes to Oklahoma, there is no "tax evasion" alleged by Respondent, an obvious concession that Oklahoma has no power over the Muscogee Creek Tribe's out-of-state purchases from Petitioner. *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 994 (2010) ("New York City . . . cannot, consistent with the Commerce Clause, compel Hemi Group, an out-of-state seller, to collect a City sales or use tax") (Ginsberg, J., concurring).

Respondent nevertheless cites a string of tax cases attempting to bootstrap its limited power to tax reservation *sales* to *non-members* into a general power to regulate the kind and price of cigarettes the Muscogee Creek Tribe can purchase from Indians outside Oklahoma. None of those tax cases support that extension of extraterritorial regulatory jurisdiction. The right to require a tribe to help collect state taxes on the *sale* of goods *to non-members* does not imbue the state with the power to regulate the kind and price of goods *a tribe* can buy from Indians out-of-state.[8]

C. Sovereign Immunity is Not at Issue.

Neither Petitioner nor its owner is a sovereign entity unbound by all state laws, and the Petition does not claim otherwise. Yet although tribal sovereignty plays a role in the analysis, it is not true that both sides of a transaction among Indians must be

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[8] *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-81 (1976) (state vendor licensing fees on reservation Indians preempted).

sovereigns to implicate the Indian commerce clause. *United States v. Holliday*, 70 U.S. 407, 417 (1865) ("Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals. And so commerce with the Indian tribes, means commerce with the individuals composing those tribes"); Cohen's Handbook of Federal Indian Law § 5.01[3], at 396 (Nell Jessup Newton ed., 2005) ("Although the [Indian commerce] clause speaks of commerce 'with the Indian Tribes,' it comprehends transactions with individual tribal Indians as well as with tribes, including transactions outside of Indian country").

It is not merely the Indian status of Petitioner or its owner that make the transactions at issue intertribal commerce. Rather, it is the Muscogee Creek Tribe's purchase of goods, FOB the Seneca Indian reservation, from an Indian corporation owned by an Indian tribal member that places this issue within the ambit of the Indian Commerce Clause. *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194-95 (1876) (confirming holding "that the power to regulate commerce with the Indian tribes [is], in its nature, general, and not confined to any locality; that its existence necessarily implies the right to exercise it, whenever there was a subject to act upon, although within the limits of a State, and that it extend[s] to the regulation of commerce with the individual members of such tribes"). Respondent's attempt to minimize the import of Mr. Montour's tribal membership and Respondent's questioning of whether Petitioner's business is conducted on Seneca land ignore what it is that Respondent seeks to regulate: the brand of cigarettes an Indian tribe can purchase

from Indians outside Oklahoma. Such regulation is not permitted absent congressional consent. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

To the extent sovereign immunity is an issue, it is so only because Oklahoma knows its courts cannot enjoin the Muscogee Creek Tribe from purchasing goods from Indians out-of-state.[9] It therefore tries through the back door what it cannot achieve through the front: to stop a Tribe's purchase of goods by attacking the out-of-state Indian vendor who does not share the Tribe's sovereign immunity. Yet that is not permissible under federal law. *Warren Trading Post Co. v. Ariz. Tax Comm'n*, 380 U.S. 685, 690 (1965) ("Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders").

D. Cigarette Regulation has been Preempted by the Federal Government.

Even within its boundaries, Oklahoma's power to regulate cigarettes is limited: it cannot impose advertising requirements or prohibitions based on smoking and health [*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001)]; it cannot require those shipping cigarettes into Oklahoma to use delivery companies that provide recipient age verification [*Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 365

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[9] This Court has "sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

(2008)] and it cannot regulate the type of cigarettes bought by tribes, nor establish a minimum price [*Dep't of Taxation v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 75 (1994)]. Because selling cigarettes is not illegal in Oklahoma, and because the cigarettes bought by the Muscogee Creek Tribe comply with all federal requirements, Oklahoma has no authority to dictate which cigarettes the Tribe can purchase from out-of-state Indians. *Cabazon*, 480 U.S. at 207-10 (California cannot prevent activity on tribal land not prohibited, but only regulated, by the state); *Milhelm Attea & Bros.*, 512 U.S. at 75.

E. Respondent's "Indian Trader Statute" Analysis is Flawed.

1. Preemption analysis is not affected by whether Petitioner is a licensed Indian Trader.

Petitioner need not be licensed by the Commissioner of Indian Affairs to point out that the Indian Trader Statutes preempt state regulation of Indian commerce. 25 U.S.C. §§ 261, *et seq*. Indeed, as this Court has confirmed: "It is the existence of the Indian trader statutes, then, and not their administration, that pre-empts the field of transactions with Indians occurring on reservations." *Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160, 165 (1980). In other words, federal preemption through the Indian Trader Statute applies with equal strength even when the seller is not a federally licensed Indian trader.

2. Respondent misinterprets cases allowing taxation of *sales* to non-members to condone regulation of a tribe's *purchase* of goods out-of-state.

Respondent argues that projecting state regulation onto out-of-state Indians is proper because it "imposes no tax or financial obligation." In support of this contention, Respondent argues that the Indian Trader cases "merely recognize the general principle that a State tax imposed on Indian traders' [sic] 'on-reservation' transactions with a Tribe *may* be preempted by the Indian Trader Statutes if the tax's financial burden is ultimately passed on to the Tribe with which the trader was dealing." Br. in Opp'n 34 (emphasis in original). But the absence of a tax obligation does not validate an improper state restriction on the kind and price of cigarettes a tribe can buy from Indians out-of-state. *Milhelm Attea & Bros.*, 512 U.S. at 75 ("By imposing a quota on tax-free cigarettes, New York has not sought to dictate 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.' *Indian traders remain free to sell Indian tribes and retailers as many cigarettes as they wish, of any kind and at whatever price*") (emphasis added).

3. Whether Oklahoma can label Petitioner's product illegal is the very issue requiring this Court's review.

Respondent argues that preemption does not apply because, according to Respondent, Petitioner's product is illegal. But the only thing that would make the product "illegal" is Respondent's decision to label it so. Respondent's argument begins with the premise that

state regulation is lawful, which of course is the very question requiring review by this Court. Put another way, Petitioner's product is legal because Oklahoma is preempted from regulating its out-of-state sale to the Muscogee Creek Tribe. *BMW*, 517 U.S. at 572-73 ("Alabama does not have the power, however, to punish [defendant] for conduct that was lawful where it occurred").

CONCLUSION

This Court should grant the petition for a writ of certiorari and review the Oklahoma Supreme Court decision.

Respectfully Submitted,

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